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ACTION.

1. This is an action of nullity brought by plaintiffs against a judgment, on the ground that it was rendered against them in the absence of their counsel, in consequence of the omission of the clerk to attach his name as attorney for them on the usual list posted up, wherefore they were deprived of the defense to which they were entitled. This omission was not attributable to the other litigants or to their counsel. It was merely an error of the clerk.

In this instance the plaintiffs have mistaken their remedy. The true one was an appeal. Their defense to the suit was, that the tacit or legal mortgage set up against them was not inscribed prior to the first of February, 1870. Relief was therefore attainable by appeal. Consequently an action of nullity will not lie.

R. Esterbrook and A. Gallier v. *Mary E. Gauche*, 36.

2. The defendant objected to this action on the ground that the petition disclosed a partnership, and between partners only an action for the settlement of the partnership will lie.

The court *a qua* erred in overruling the exception. The record discloses the fact that this demand grows out of a partnership between plaintiff and defendant for carrying freight and passengers for hire on the steamer Ella May. The objection to the form of the action should have been maintained.

M. N. Radovich v. *Louis Frigerio, Jr.*, 68.

3. Plaintiffs are not seeking in this case to recover a specific piece of property which they allege to have been unlawfully taken from them and found in the possession of defendants. The petition declares upon an indebtedness, inasmuch as the petitioners say that defendants are indebted to them in a certain sum of money, which one in their employ unlawfully took from them and which was subsequently taken from him in an unlawful manner by defendants who keep a gambling establishment. The court *a qua* did not err in dismissing the petition which showed no cause of action.

Steamboat Carrie Converse and Owners v. *Jacob Feitig et als.*, 117.

4. The right of the party assailed in a petitory action to inquire into the validity of the proceedings under which the party attacking acquired title can admit of no doubt.

ACTION—Continued.

A purchaser at sheriff's sale can not maintain a petitory action to recover the property, where it has not been actually taken possession of by the sheriff in making the seizure.

An adjudication under an illegal or insufficient seizure conveys no title.

In this case, the whole proceeding purporting to be *in rem* was carried on up to the very day of the sale without the knowledge of the defendant, the owner of the property, who was by himself or tenants in actual possession thereof. The special law establishing certain formalities to be observed in judicial proceedings in order to constitute a seizure of real estate in the parishes of Orleans and Jefferson, does not apply to a case of this sort. That law, acts of 1857, p. 185, directs that notice is to be given to the party whose property is to be seized, to be followed by the recording of the notice in the office of the recorder of mortgages.

Dennis Cronan v. *Edward Cochran et als.*, 120.

5. The third opponents in this case attempt to regulate the effect of a seizure by a creditor with special mortgage and vendor's privilege, in what relates to them or their junior mortgage, eighteen months after the seizure had been released, the sale consummated, and the funds distributed. This is an extraordinary proceeding. There is no longer any ground for a third opposition to stand upon. The exception that there is no cause of action is well taken.

Payne, Dameron & Co. v. *Eaton & Barstow—E. J. Gay & Co., Third Opponents*, 160.

6. While there are facts in the evidence calculated to raise some doubt in regard to the perfect good faith of the transactions between the father and the son as to the creditors of the former, yet the sale of the property in question from the former to the latter can not be treated as a pure simulation. The sale may have been resorted to for the purpose alleged by the plaintiff, but, whether for fraudulent purposes or otherwise, could only have been successfully assailed by a regular revocatory action, which the plaintiffs have debarred themselves from bringing by permitting the time to elapse within which that action might have been instituted.

Currie, King & Co. v. *J. O. Pierce et als. Scott & Brother* v. *The Same. (Consolidated).* 268.

7. As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and

ACTION—Continued.

resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferrer, the payee thereof, was a citizen of this State and had no such right.

New Orleans Canal and Banking Company v. *The Recorder of Mortgages of the Parish of Pointe Coupee et als.*, 291.

8. Plaintiff claims a certain amount of money alleged to have been loaned to defendant. The conduct of plaintiff, under the circumstances of the case, is such as not to leave it free from the suspicion that it was regulated so as to insure, under the guise of a loan, the payment of the losses of defendant in a gambling house kept by plaintiff, when the payment of said losses could not directly be enforced on account of immoral consideration and from the violation by the parties of a prohibitory law. Courts of justice are not open to litigation of this kind.

H. J. Sampson v. *Norman Whitney*, 294.

9. Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within that delay, or the action, if excepted to, will be dismissed. In this instance the suit should have been brought within ten days after the election. The court below erred in not maintaining the exception of the defendant on that ground. The law is not ambiguous, and no room is left to the discretion or equity powers of this court; it must, therefore, be administered as it is, however unwise some of its provisions must appear.

J. L. Belden v. *Thomas P. Sherburne*, 305.

10. All actions against the city of New Orleans, for work or labor done, either under a contract or for damages, or extra work, are prescribed unless commenced in one year from the time such work is required to be performed, or such damages are alleged to have arisen. *John Wolf* v. *The City of New Orleans*, 309.

11. The plaintiffs, as heirs of Isaac Lay, sue the succession of O'Neal for a large sum to be paid in the course of administration, and allege in substance that O'Neal was their tutor for many years. The defendants have excepted to the mode of action and to the jurisdiction of the court. The judge *a quo* erred in overruling the exception.

The plaintiffs should have called upon the executrix of the deceased, O'Neal, to file an account of his tutorship, and by opposition to the account, should have raised the issues involving its correctness, and then have the various matters in contestation duly proceeded with and determined in their regular order, and the tutor's liability, if any, definitely fixed by final judgment of the parish court.

ACTION—Continued.

Instead of this proceeding, the plaintiffs bring suit in that court against the succession of O'Neal for an arbitrary amount, which they fix themselves as the indebtedness of the tutor, and pray judgment against the succession for that sum, an amount far above the jurisdiction of that court in a direct action for a specific sum of money. This is illegal, and can not be maintained.

Sarah L. Lay et als. v. *Succession of Elias O'Neal*, 643.

12. This court will have nothing to do with a suit springing from a fund created for the purpose of corrupting and improperly influencing members of the Legislature in their action on matters of legislation then before them.

Wm. Durbridge v. *The Slaughterhouse Company, A. J. Oliver intervenor*, 676.

See Privilege, No. 4—*Crescent City Gaslight Company* v. *New Orleans Gaslight Company*, 138.

See Community, No. 4—*Julia Williams and Husband* v. *Fuller*, 634.

See Offices and Officers, No. 12—*State ex rel. Milliken* v. *Ward*, 659.

ADMINISTRATOR AND ADMINISTRATRIX.

1. Parol evidence was clearly inadmissible to prove that the wife of the defendant was the debtor in a contract executed by him, and that he signed it as her agent, and not in his individual capacity as it appears in the contract itself, no error or mistake in executing the instrument being alleged in the answer.

This testimoney being excluded, there is no reason why the defendant, who was not one of the heirs of his wife's father, should not pay the debt he contracted with the administrator of the succession, whether there are, or not, sufficient funds in his hands to pay the debts of the deceased.

If the plaintifff had consented, when the instrument was given, in consideration of the purchase by the defendant of succession property, that said defendant should not be required to pay the debt until there was a partition of the estate among the heirs, it would not have been obligatory, because an administrator can make no contract in a matter of that kind binding on the succession, he having no right to fix the terms of selling succession property.

O. W. Fluker, Administrator v. *Amos Kent*, 37.

2. The right of the administratrix to revoke her power of attorney to administer the affairs of the estate which she had in charge, can not be doubted. All acts done by her agents under said special power, subsequently to the revocation and notice to them of the revocation, can not be considered as binding upon her. The ac-

ADMINISTRATOR AND ADMINISTRATRIX—Continued.

count filed by them was without effect and the court *a qua* erred in acting upon it.

Succession of Francois Babin—Opposition to account of Administratrix, 114.

3. After the decease of his wife, the plaintiff, administrator of community property, gave to A. Ledoux his note for a community debt, and mortgaged a tract of land belonging to the estate to secure its payment. The executrix of A. Ledoux obtained judgment, issued execution, and caused a seizure to be made. The plaintiff, as administrator, enjoins the sale. The record shows that the estate has not been settled up; there are debts outstanding against it besides the one for which the administrator gave his note. Under such circumstances, the seizing creditor could expect only to be paid concurrently with other creditors of the estate in the due course of administration. His proceedings are illegal and irregular.

Lovel Ledoux, Administrator, v. *J. E. Breaux, Sheriff, et als.*, 190.

4. The land in controversy having been sold as the property of R. W. Graves, and his legal representative—the curator or administrator of his succession—having been cited to answer both the original and amended petitions claiming said land, and issue joined thereon as to him, the judgment for the land according to the corrected description was proper, but the judgment for the rent was erroneous. The curator was not the trespasser or actual possessor, and the minors could not be held liable for the act of trespass of their mother, now deceased, as well as their father. They could only accept with benefit of inventory, and take the succession of their mother after its debts were paid. But her succession was not before the court, nor was any one who could stand in judgment for such a claim against her.

Thomas H. Hunt v. *Mrs. A. V. Graves*, 195.

5. Where the property of the succession was offered for sale for cash, and, no one bidding, it was immediately offered on the the terms of credit designated in the order, and was adjudicated to the administrator thereof, who directed the sheriff to adjudicate it to one Mrs. Simmons, a person having no real intention of purchasing, but receiving the adjudication only as an act of frendship to the administrator:

Held—That the succession never was divested of the property.

Ambrose et al. v. *Madison Marsh*, 241.

6. A suit against an administrator of an estate for alimony by natural children can not be maintained.

Ann Dalton, for the use of, etc. v. *Succession of Patrick Halpin*, 382.

ADMINISTRATOR AND ADMINISTRATRIX—Continued.

7. Conceding that there was in this case such a contestation for the administration of the estate of the deceased as to authorize the appointment of the public administrator to administer until the final decree determining the rights of the respective claimants, as provided by section two of act 87 of the session of 1870, the judge erred in giving the permanent administration to him, as this is not a case in which the public administrator could be appointed, the heirs being present and represented. When the major heir failed to furnish bond and qualify, the tutor of the other heir should have been appointed.

Successions of Daigle and Mary Jane Roddy, his wife, 524.

8. The law establishing the office of public administrator did not repeal the clause of the article of the Civil Code, giving the wife, under certain contingencies, the right to administer the succession of her husband. The succession of Miller is not of that class of vacant successions which the law authorizes the public administrator to administer *virtute officii*.

The judgment of the court below is erroneous in allowing commissions to the public administrator. He was wholly without right to administer the estate, and he knew it. His pretension that he was appointed to administer provisionally, does not help his case. The provisional appointment was improperly made.

The provisional appointment of the public administrator to administer an estate applies only to cases of contestation between third parties, not to cases where the public administrator himself is a contestant, and especially where he puts up that contestation for his own profit.

Whatever charges have been incurred for inventory, appraisement and proceedings to put the opponent, Mrs. Miller, in possession, are to be at the cost of the succession, but not the costs incurred by her opposition to the public administrator's claim to administer the estate.

Succession of Everett Miller—Contestation in regard to administration and oppositions to the account filed by the Public Administrator, 574.

SEE JURISDICTION—No. 12—*Succession of William Bobb*, 344.

SEE MORTGAGE—No 13—*Succession of Gayle*, 547.

AGENT AND PRINCIPAL.

1. This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State.

AGENT AND PRINCIPAL—Continued.

P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff, at the time he did so.

M. A. Dockham and Husband v. Jonathan Potter, 73.

2. The right of the administratrix to revoke her power of attorney to administer the affairs of the estate which she had in charge, can not be doubted. All acts done by her agents under said special power, subsequently to the revocation and notice to them of the revocation, can not be considered as binding upon her. The account filed by them was without effect and the court *a qua* erred in acting upon it.

Succession of Francois Babin—Opposition to account of Administratrix, 114.

3. The defense to the plaintiff's claim is the prescription of three and ten years. The relation of the parties was that of agent and principal, and the right of the planter to sue his factor for an account is only prescribed by ten years. But if this relation had not existed between the parties, the defendants rendered an account in which they acknowledged their indebtedness. This acknowledgment would prevent the prescription of three years from applying, as to an open account.

J. E. Prudhomme v. *O. B. Plauche et als.*, 133.

4. In this case it can not be doubted that the plaintiff had the right to manage her plantation, which was paraphernal property, and that a mandate having for its object the management thereof has a lawful object. Therefore, as there is no law forbidding the plaintiff from appointing her husband an agent to aid her in the administration of her plantation, it must be concluded that she had the right to do so.

The thing seized being raised on the plantation of plaintiff, which she administered, aided by her husband as agent, it follows that it was her separate property, and not liable to seizure by her husband's judgment creditors.

Amelia Simoneaux, Wife of Emile E. Lauve, v *Edgar P. Helluin, Sheriff, et al.*, 183.

5. Clark, as agent of Mrs. Lane, having entered into a contract of assurance with defendant and paid the premium with her means, could not direct the insurance money to be paid to his own creditor; it belonged to his principal.

George D. Pritchett v. *Mechanics and Traders' Insurance Company. Mrs. Sarah C. Lane, Intervenor*, 525.

SEE EVIDENCE, No. 13—*Davidson & Hill* v. *Bodley*, 149.

ALIMONY.

1. A suit against an administrator of an estate for alimony by natural children can not be maintained.

Ann Dalton, for the use of, etc. v. *Succession of Patrick Halpin*, 382.

APPEAL.

1. This appeal was made returnable at the session of the Supreme Court to be held at New Orleans on the first Monday of November, 1874. Before the return day, to wit, on the twentieth of July, 1874, the relator procured the consent of the Governor for the transfer of the case to Monroe, and for its trial at the term held at that town. The Governor also employed an attorney for the defense, notwithstanding the opposition of the Attorney General and of Dubuclet, the defendant.

The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and the act 21 of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

The citation was necessary to perfect the appeal. The defendant's case can not be tried without his consent, except at the time and place designated in the citation. A trial at a different place would be a trial without a citation. Besides, he is entitled to the delay fixed, to prepare his defense.

The plea that defendant is not interested, has no force. If not interested, why was he cited and made a party?

There is nothing in the act for "funding the obligations of the State," relied on by relator, which confers on him or implies a right or duty, as "Fiscal Agent," to recover from the State Treasurer, and to hold and account for, under the obligations of his official bond, all the moneys belonging to the State, or to choose a bank for such purpose, and nothing which imposes on said treasurer the duty to deposit said moneys with the relator, and therefore there is no cause for the mandamus prayed for.

It is only where a specific, ministerial duty is imposed by law on an officer, that the writ of mandamus can properly issue against him. The term "fiscal agent" does not necessarily mean depositary of the public funds, so as, by the simple use of it in a statute without any directions in this respect, to make it the duty of the State Treasurer to deposit with him any moneys in the treasury and confer on such agent power to compel such deposit.

State ex rel. Albert Baldwin v. *A. Dubuclet, State Treasurer—State of Louisiana intervenor*, 29.

2. This is an action of nullity brought by plaintiffs against a judgment, on the ground that it was rendered against them in the

APPEAL—Continued.

absence of their counsel, in consequence of the omission of the clerk to attach his name as attorney for them on the usual list posted up, wherefore they were deprived of the defense to which they were entitled. This omission was not attributable to the other litigants or to their counsel. It was merely an error of the clerk. In this instance the plaintiffs have mistaken their remedy. The true one was an appeal. Their defense to the suit was, that the tacit or legal mortgage set up against them was not inscribed prior to the first of February, 1870. Relief was therefore attainable by appeal. Consequently an action of nullity will not lie.

R. Esterbrook and A. Gallier v. *Mary E. Gauche*, 36.

3. It has been decided that a devolutive or suspensive appeal from a final judgment of a district court, does not suspend prescription pending the appeal. Therefore prescription, running in this instance from the twelfth December, 1863, the day on which the judgment relied on by plaintiff was rendered, which judgment was affirmed on the tenth January, 1867, was not interrupted by this suit instituted on the fifth of December, 1871, and fixed for trial on the eleventh September, 1874, on motion of plaintiff's counsel, when, on that day, the defendant filed the plea of prescription.

Samory v. *Montgomery*, 50.

4. The answer to an appeal which asks to have the judgment amended, filed after the motion to dismiss, without reservation of the same, waives the application to dismiss.

Rhoda E. White v. *Mgra Clark Gaines*, 75.

5. This court will, of its own motion, dismiss an appeal for want of pecuniary interest in the appellant.

Block, Britton & Co. v. *Barton, Miller & Co., and Peet, Yale & Bowling* v. *The Same—Lewis & Co. and Clinton intervenors*, 89.

6. The judgment in this case having been rendered at a different term from that at which the appeal was applied for, the appeal could be taken only by petition and citation. Therefore the motion to dismiss must prevail.

Mrs. Mary Hardy v. *John A. Stevenson*, 95.

7. When an appellee asks for an amendment of the judgment, he will not be allowed damages for a frivolous appeal.

Francis C. Mahan, Liquidator, et al. v. *Frederick Michel and Wife*, 96.

8. Where the minutes of the court below do not show that the order was allowed on the motion for an appeal, but where it is stated elsewhere in the record by the judge that he did grant the order, this court will not be disposed to make an appellant suffer for such neglect of duty by the clerk of the court *a quo*.

APPEAL—Continued.

Where a suspensive appeal was allowed, but the bond was not filed until more than ten judicial days after the judgment was signed;

Held—That the bond being for the amount fixed by the judge, the only penalty incurred by the appellant was the right of the appellee to issue execution, the appeal operating simply as a devolutive one. The *ex parte* order setting aside the appeal, under the circumstances, did not divest this court of jurisdiction.

Albert B. Edgerly, Executor of John Marshall, deceased, v. *W. G. Smith*, 97.

9. Where final judgment was rendered in favor of the two members of the defendant firm, who were before the court, and the appeal was taken as to one only;

Held—That both defendants having an interest in maintaining the judgment, should both have been made parties. The motion to dismiss the appeal must prevail.

Lucy Hammit and Husband v. *Payne, Huntington & Co.*, 100.

10. It is the duty of the appellant to bring up a complete transcript, or in proper time suggest a diminution of the record, in order that it should be corrected, if possible, and the trial be proceeded with. The fault being imputable to the appellant, the appeal must be dismissed.

Widow F. L. Charbonnet v. *Edward Dupasseur et al.—A. Rochereau, Intervenor*, 105.

12. A motion to dismiss an appeal on the ground that it is frivolous can not prevail, although it may be a good one for giving damages when the case shall be tried on its merits.

A party may obtain judgment on motion after ten days notice.

Henry Reiners v. *Valentine St. Ceran—S. D. Maxwell, Surety on Appeal Bond*, 112.

13. Where it clearly appears that neither the motion in open court was made, nor an order granting an appeal was obtained within the required time, the motion to dismiss must prevail.

E. A. Deslonde, Testamentary Executor v. *The State National Bank*, 119.

41. That the matter in dispute in this case against each of the plaintiffs is less than $500, is no ground to dismiss the appeal. The matter in dispute is the sum claimed by defendants under a contract with the city, and the amount in the contract far exceeds $500. The controversy as to them involves the validity of the contract. As they could appeal from the judgment, had it been against them, the plaintiffs also can appeal.

It is sufficient that the surety has signed the appeal bond—the appellants, parties to the suit, being bound without signing the bond, to abide the result of the litigation.

APPEAL—Continued.

The appeal bond was filed in time. The delay occasioned by the mandamus proceedings to compel the judge to grant the appeal, can not prejudice the appellants.

It is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made to petition the counsel for that purpose. It is sufficient if it be done by those on the portion sought to be improved.

James Ready et als. v. *City of New Orleans et al.*, 169.

15. Where the transcript of the appeal was filed on the seventh of November, 1874, and on the eleventh the defendants, appellees herein, filed an answer praying for an amendment of the judgment, and where on the fourteenth they moved to dismiss the appeal, because the appeal bond was not for a sufficient amount, because the transcript was not filed in time, and because the clerk certifying the record omitted to append his signature:

Held—That the motion came too late.

Besides, having joined in the appeal, the appellants ought not to be heard asking for its dismissal.

The certificate appended to the record should be signed by the clerk. This court, of its own motion, orders it to be done, and denies the motion to dismiss. *John T. Michel* v. *Zerilla Meyer et al.*, 173.

16. The respondent refuses to grant to relators a suspensive appeal on the ground that their intervention not having been filed by leave of the court, or served or put at issue, did not authorize a judgment in their favor or against them from which they could appeal. In this there was error on the part of the judge *a quo*. If the relators were not parties to the suit, it was because the judge erroneously refused to allow them to intervene. But third parties may intervene when they allege, as they do in this case, that they have been aggrieved by the judgment.

State ex rel. Mrs. Pecot et al. v. *Parish Judge of the Parish of St. Mary*, 184.

17. The certificate of the clerk of the court *a qua* as to all the matters in regard to plaintiff, defendant, and the intervenors who have appealed, is sufficiently full. The proceedings as to the intervenor Bender, who did not appeal, are not material in the controversy between the parties before this court, and their omission from the record can not prejudice or affect the parties.

The record shows that the citations on the intervenors were served, but before the specified delay expired, and before issue was formed thereon either by default or otherwise, the plaintiff caused the default taken by her against the defendant to be confirmed and the intervention dismissed. This was irregular and premature. Issue should have been joined.

Mrs. S. C. Lane v. *Joshua G. Clarke—Heirs of Lane et als. intervenors*, 201.

APPEAL—Continued.

18. The relator having applied for a rule on the sheriff to show cause why said sheriff should not retain in his hands a certain piece of property which he was going to release, and having prayed for an injunction in the meantime, the judge *a quo* refused the rule and injunction; the relator has appealed and applied for a mandamus to compel the judge to grant the appeal. The remedy is not by appeal from such a refusal. There was nothing done in the lower court for this court to revise.

State ex rel. E. J. Gay v. *Judge of the Fifth Judicial District Court*, 211.

19. A judgment acquiesced in and partially executed can not be appealed from.

The plea that acquiescence in a judgment can not be given by a police jury so as to prohibit a parish from appealing from a judgment rendered against it, is not tenable. There is no reason why a parish should not be bound by the acts of its agent as an individual would be.

C. K. David v. *The Parish of East Baton Rouge*, 230.

20. The indorser of a note having obtained a suspensive appeal from a judgment against him as such, and having given as surety on the appeal bond the maker of the note, against whom a separate judgment was rendered in the same suit, and the parties having severed in their defense;

Held—That in cases previously decided, the sufficiency of such a surety was maintained, the surety and principal not being coappellants, and the former having all the requisites prescribed by the law.

State ex rel. John Coleman v. *Judge of the Sixth District Court, Parish of Orleans*, 234.

21. Appellant gave no bond under the order for a suspensive appeal, but gave bond after getting an order for a devolutive one. This was not an abandonment of an appeal. There is no appeal until the bond is given, it matters not how many orders of appeal have been granted.

As the sheriff is a mere depositary, in this case, of the funds sought to be distributed, he has no interest in the controversy, and need not be made a party to this appeal.

Bank of America v. *Septime Fortier. Third opposition of E. J. Gay & Co. Third opposition of Citizens' Bank*, 243.

22. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign recip-

APPEAL—Continued.

rocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal, refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

Isaac F. Riley v. *Heirs of E. M. Riley*, 248.

23. The motion to dismiss this appeal on the ground that the appeal bond was not executed in favor of the clerk can not prevail. The bond was executed in favor of John S. Lanier, whom the record shows to be clerk. *Succession of Mrs. S. B. Fuqua*, 271.

24. The suggestion to dismiss this appeal is made under the statute No. 25, acts of 1874, but is not, in reality, supported by any one of its provisions. An appeal can not be dismissed upon a mere suggestion in argument, after the case has been taken up on its merits, without any reservation of the right to move to dismiss.

Succession of G. S. Dufossat et al. v. *B. S. Labranche et al. Opposition of R. Brown et als., laborers*, 283.

25. This is a suit personally against a tutrix, one of the defendants, on six mortgage promissory notes given by her, and also as representing those of her children who were minors when the suit was brought, and the majors who joined in the act of mortgage, for the amount of the notes sued on, and for a decree of lien and privilege on the property mortgaged. The defendant, one of the heirs, a minor when judgment was rendered but now of age, appeals from said judgment.

The motion to dismiss defendant's appeal on the ground that all his joint obligors have not been cited and made parties to the appeal, can not prevail. He is not a joint obligor; his liability is as heir of his father, and his liability is fixed by his interest in his father's succession.

Vernon K. Stevenson v. *Lavinia Edwards et al.*, 302.

26. The judgment having been rendered by default and no notice of judgment having been given when the appeal was taken, it was therefore in time.

The bond of appeal was given for the amount fixed to cover costs and in favor of the person who is clerk. This is sufficient.

The plea of prescription having been filed in this court and the appellee having asked that the case be remanded to show an interruption of prescription, under the law this must be done.

Charles Hoffman v. *J. O. Howell and I. F. Riley*, 304.

27. When the suspensive appeal bond was signed by Cox as agent for Palmer, if he had no authority to bind Palmer, he certainly bound himself, and it is not shown that he is not solvent and good as a

APPEAL—Continued.

surety for the amount of the bond. Palmer has subsequently ratified his action in express terms. Therefore appellee has not been without a surety personally good and sufficient to protect his interest pending the appeal. He has no cause to complain, and the judge *a quo* erred in setting aside the appeal.

State ex rel. W. Van Norden v. *Judge of the Fifth District Court, Parish of Orleans*, 306.

28. The motion to dismiss the appeal on the ground that there was no order of appeal, came too late, said motion having been filed more than three days after the transcript was filed.

A. W. Walker v. *C. S. Sauvinet, Sheriff, et als.*, 314.

29. In the injunction case of Coons *v.* Cannon et als., on exception of no cause of action being disclosed by the petition, the injunction was dismissed as in case of nonsuit. Plaintiff, alleging that defendants were largely indebted to him, and in possession of the steamer Katie, of which he claimed to be part owner, and that they were about to sell her, had applied for an injunction restraining the sale, which was granted upon his furnishing bond in the sum of $1000. From the order dissolving said injunction as aforesaid, plaintiff prayed for a suspensive appeal on his furnishing his bond in the sum of $250. The district judge refused a suspensive appeal except on a bond of $25,000, and appellant now applies for a mandamus to compel the judge *a quo* to allow the suspensive appeal on a bond of $250.

It is true that no moneyed judgment is rendered against the relator, nor is he ordered to deliver any property, but he sought to restrain the defendants from selling a valuable piece of property worth $60,000. The court below dismissed his pretensions. If he obtains a suspensive appeal on a mere nominal bond, he perpetuates the injunction, at all events, until his appeal is disposed of. His injunction bond being only for $1000, it is easily seen that in case of failure, the defendants are without that security for damages which the law provides for them.

Under these circumstances, the bond which relator should be required to give on his suspensive appeal is not the value of the property in dispute, but the amount of damages which may result from the improper issuing of the injunction, and which this court thinks would be covered by the sum of five thousand dollars.

State of Louisiana ex rel. Temple S. Coons v. *The Judge of the Superior District Court*, 334.

30. The motion to dismiss is overruled. The questions at issue in this case are not of ordinary but of probate jurisdiction, and article 88 of the constitution provides that in all probate matters, when the

APPEAL—Continued.

amount in dispute shall exceed five hundred dollars exclusive of interest, the appeal shall be directly from the parish to the Supreme Court.

In the exercise of its probate jurisdiction the parish court can sell succession property, as was attempted in this case, because it is a power essentially necessary in the settlement of successions, and as an incident to the right to sell, the parish court has jurisdiction to enforce the remedies provided by law against a bidder who refuses to comply with his bid.

Succession of William Bobb—Ernest Merilh v. *W. L. Hodgson*, 344.

31. The relator had the right to take a suspensive appeal within ten days from certain orders of the judge *a quo* in relation to the sequestration of his property, and the release thereof on bond, and any attempt to execute the order before that time expired was unauthorized, and when the appeal was taken, the parties were left in *statu quo* before the order, and the effect of the prohibition issued by this court is to maintain the parties in the position they were in before the rendition of the order appealed from.

State ex rel. Pierre Gourgotte v. *Jean Porte et al.*, 431.

32. Where the certificate of the clerk is in the usual and proper form, if the appellant has not seen to having a proper record placed before this court and the evidence has not come up upon which he expects to get a judgment, he must take the consequence. If the evidence is necessary to plaintiff, he should have suggested a diminution of the record and called for *a certiorari*.

Samuel Choppin v. *James Wilson, et al.*, 444.

33. The intervenor in this case, J. Q. A. Fellows, has not given bond for appeal. It is not sufficient for him to have joined the city in taking an appeal, and that the city has given bond for costs, the only bond that could be required. The intervenor is a separate, independent party in the litigation. The obligation of the city to pay costs does not cover the costs of intervention.

This suit is for the same purpose as that stated in No. 5735, previously reported. As pledgers, the relators have sufficient interest to demand that respondents shall perform the duties required of them by their pledgee.

State of Louisiana ex rel. Mississippi and Mexican Gulf Ship Canal Company v. *The Administrators of the city of New Orleans*, 469.

34. Where certain parties, whose claims did not exceed five hundred dollars, united with others whose claims exceeded that sum for each one of them and sued the city of New Orleans for several thousand dollars;

APPEAL—Continued.

Held—That having united in one suit for convenience and economy, and now desiring to sever, they can not thus be permitted to deprive the city of New Orleans of the benefit of an appeal, and that their motion to dismiss can not prevail.

Maurice N. Bowman et als. v. *The City of New Orleans*, 501.

35. The motion to mismiss the appeal made by each of the two plaintiffs, on the ground that all the plaintiffs were not made parties to the appeal, can not prevail. There is but one judgment in the case, for which an appeal was granted in open court within ten days after the rendition of the judgment and at the same term of court. No citation was necessary and both plaintiffs were made parties to said appeal, taken by motion. The fact that afterward a petition for an appeal was filed did not affect what was previously done.

The New Orleans Canal and Banking Company et al. v. *The City of New Orleans*, 505.

36. A motion to dismiss an appeal, to be entertained, must be filed within three judicial days after the return day.

A defect in a certificate would be no cause to dismiss an appeal, the fault being attributable to the officer whose duty it is to make the certificate.

A deputy clerk is an officer known to the law and is authorized to sign certificates.

Nicholas Burton et als. v. *Charles Hicks et als.*, 507.

37. It is no part of the duty of the clerk of the Finance Department to execute or pay judgments against the city of New Orleans, so as to bind it, and particularly when said city had taken a suspensive appeal of which the clerk was not aware. It is no reason to dismiss the appeal, that the defendant and appellant has acquiesced in the judgment by receiving payment of taxes from the plaintiff in accordance with said judgment.

T. S. Serrill v. *The City of New Orleans*, 520.

38. This appeal has been taken and brought up, and the fact that it is designated as a suspensive appeal is not a cause for dismissal, on the ground that it is from a judgment on an opposition to the appointment of an administrator, which the law does not allow. There is no objection to the sufficiency of the appeal bond, which is for a sum fixed by the court, or the right to an appeal from the judgment as a devolutive appeal.

Succession of Treville Daigle and Mary Jane Roddy, his wife, 524.

39. This appeal was made returnable to this court on the first Monday of November, 1875, by the Superior District Court, parish of Orleans, and is made by law returnable at New Orleans. This court

APPEAL—Continued.

declines to try the case before the day it is made returnable, and at Monroe, a different place from that fixed by law, for the hearing of this appeal, even though the parties have consented to it.

State of Louisiana v. *Charles Clinton. Frank Morey, Intervenor*, 540.

40. Appeals from the Superior District Court of New Orleans are returnable at New Orleans. That court, therefore, was without authority to make this appeal returnable at Monroe. Consent can not give jurisdiction, neither can consent change the law which designates the place where appeals shall be returnable.

The Citizens' Bank of Louisiana v. *The Board of Liquidation*, 543.

41. The motion to dismiss the appeal because there is no day fixed for the return of the appeal, can not prevail. The appeal is made "returnable to the Supreme Court of the State of Louisiana at its next term, commencing in the city of Monroe on the first Monday of July, 1875." This was fixing the day with sufficient certainty.

Succession of W. H. Gayle. Opposition of G. King and others to final account of Administratrix, 547.

42. The appellant who shows title to the property in dispute can make any objection necessary to protect his interest.

Levy & Sugar v. *Cowan & Mayo*, 556.

43. Before the bond of the defendant and appellant was filed the plaintiff died. Subsequent to plaintiff's death, the required bond was filed.

The motion of plaintiff's representative to dismiss the appeal upon the ground that he is not properly before the court, can not prevail. Plaintiff's death did not interfere with defendant's rights. As soon as the bond was filed, the jurisdiction of this court attached. If the plaintiff has died since the appeal was granted, the proper parties will have to be made here.

James W. Howard v. *C. Yale, Jr., & Co. Wimbush & Howell, Intervenors*, 621.

44. The motion to dismiss the appeal taken by plaintiffs can not prevail. To have filed in the parish court a petition similar to the one now under consideration after an appeal was granted from a judgment of the district court declaring that it had no jurisdiction, is not such an acquiescence in the judgment as will prevent an appeal.

The acquiescence which prohibits an appeal or destroys it when taken, is the acquiescence in a decree commanding something to be done or given. If the thing commanded to be done or given, is done or given, the judgment is acquiesced in. Here nothing

APPEAL—Continued.

was ordered to be done. The judgment of the district court was simply that it had no jurisdiction. It did not order plaintiffs to institute proceedings in the parish court.

J. Buntin et al. v. *E. M. Johnson*, 625.

45. The sureties on a suspensive appeal bond can be made liable where execution issued on certificate of the non-filing of the transcript by the appellant, and the money could not be made after taking necessary steps against the principal.

Moore, Janny & Hyams v. *Louis Lalaurie*, 645.

46. The appellant will not lose his right to appeal because his surety on the appeal bond has become insolvent, and in such case it is the duty of the court to allow a sufficient surety to be substituted. This is precisely what the court below has done. It allowed appellant to give new security within ten days after the trial of the rule which decided the insolvency of the surety on the bond.

Appellant, who refuses to comply with this order and to substitute a new surety, has no right to expect this court to refuse to dismiss his appeal. *E. B. Benton* v. *F. C. Mahan*, 649.

47. It was never contemplated that one sued before a justice of the peace could bring his case to be revised before the district or parish court, and before this court also. The right of double appeals is not conferred by the constitution.

State ex rel. Patrick Leahy v. *Third Justice of the Peace, parish of Orleans, et al.*, 669.

48. An order of seizure and sale can be issued against mortgaged property transferred to a third possessor who assumed the payment of the mortgage debt, where the act of mortgage does not contain the non alienation clause.

Whether proper notice has been given to the parties entitled to it, can not be considered in this appeal from an order of seizure and sale. It has repeatedly been held in an appeal of this kind that the only question is, whether the evidence authorizes the issuing of the fiat.

J. B. Henry v. *Meyer Goldman. Leon G'Sell, Appellant*, 670.

49. The judge *a quo* refused to grant an appeal from his refusal to grant an injunction in chambers. This court can issue no mandamus in the matter. The judge *a quo* has, in this case, simply refused to act and grant an *ex parte* order upon an *ex parte* showing. This refusal can not be considered as a final judgment or an interlocutory order within the purview of the Code of Practice or any law from which an appeal lies, because it may work an irreparable injury. There is nothing for this court to revise, and hence there is no ground for an appeal. It would be virtually

APPEAL—Continued.

assuming original jurisdiction, were an order granted for an injunction, when none had been issued by the lower court. The non-action of the district judge in the premises can not be revised, amended or modified by this court.

State ex rel. H. Newgass v. *Judge of the Superior District Court, parish of Orleans*, 672.

50. There is no force in the objection of the respondent that appellant in applying for an appeal did not specially ask for a suspensive appeal. He applied for an appeal, and he gave bond within ten days for an amount sufficient for a suspensive appeal.

State ex rel. John G. Eustis v. *The Judge of the Fourth District Court, parish of Orleans*, 685.

51. According to law a suspensive appeal is to be taken within ten days from the notification to the party cast of the judgment complained of. But the requirements of the law are not prohibitory, and it is understood by this court that any engagement not prohibited by law and not repugnant to good morals may be enforced between the parties thereto. The law does not say that the parties may not agree that the time for making an application for a suspensive appeal may not be extended, nor does it forbid the parties from fixing the amount of the appeal bond among themselves. The provisions of the law on the subject are for the protection of the parties in litigation. Either party may waive his rights to this protection, and if he chooses to do so and contracts to do so, his contract can be enforced.

The district judge has the power of pronouncing on the question whether an appeal is or shall be suspensive or devolutive, and of saying whether the appellee shall be entitled to take out execution, notwithstanding the appeal. But when it is a judgment which this court may reform, when the case is within its jurisdiction, it may determine that an appeal is suspensive, which the district judge may have decided was devolutive. In the like manner this court can decide whether the surety is good and solvent, and revise the judgment of the lower court on this point.

Therefore, in this case, the application for a suspensive appeal, being made within the time agreed upon by the parties in interest and authorized to make the agreement, is valid.

State ex rel. Pontchartrain Railroad Company v. *Judge of the Superior District Court et als.*, 697.

52 In a suit for dissolution, settlement and liquidation of partnership, the judge *a quo* having appointed a liquidator, one of the partners appealed from this interlocutory order. The case being called for trial on its merits, the appellant objected to its being tried pend-

APPEAL—Continued.

ing the suspensive appeal from the order appointing a liquidator. The court *a qua* erred in sustaining the objection and in continuing the case.

State ex rel. James Wood v. *Judge of the Fifth District Court, parish of Orleans*, 702.

53. A party obtaining an injunction prohibiting a sheriff from executing a certain judgment, can not, after the injunction is dissolved and no appeal taken therefrom, appeal from a decree of the court making absolute a rule taken upon the sheriff to show cause why he should not put the purchaser in possession of the property sold in execution of the judgment, after the dissolving of the injunction. The plaintiff should have appealed from the judgment dissolving the injunction, if injured thereby. He can not appeal from an order which merely carries out a decree.

State ex rel. Nicholas Schmidt v. *Judge of the Second Judicial District Court, parish of Jefferson*, 703.

SEE TAXES AND TAX COLLECTORS, No. 7—*O. J. Flagg* v. *The parish of St. Charles*, 319.

SEE SURETY, No. 5—*Leblanc* v. *Succession of Massieu*, 324.

SEE JURISDICTION, No. 16—*Smith & McKenna* v. *Edwin Charles*, 503.

ATTACHMENT.

1. Cire, the subrogee of Powhatan Wooldridge to a judgment obtained by the same *v.* E. Monteuse—which judgment was transferred from P. Wooldridge to E. Wooldridge, and by E. Wooldridge to Cire, caused a *fi. fa.* to issue in said judgment. Hedrick, the intervenor, took a rule against him to quash the writ, on the ground that he, the intervenor, was the real owner of the judgment, seized in the suit of Hedrick *v.* E. Wooldridge, and purchased by him at sheriff's sale. Hedrick had proceeded by attachment against E. Wooldridge, absentee. In this attachment case several citations were made, but it seems that in every instance the returns of the sheriff were simply that service of petition and citation was made on the curator *ad hoc* in person, mentioning the name of the curator. It appears from the returns of the sheriff, that in neither of the instances were copies of the attachment and citation affixed to the door of the room where the court in which the suit was pending is held.

Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return. A court can presume nothing with regard to a party being cited.

The failure to serve the proper citation is fatal to the intervenor's claim to be the owner of the judgment forming the object of this litigation. Therefore the rule was properly discharged.

ATTACHMENT—Continued.

Subsequently to a decision of the lower court, that the order granted for a suspensive appeal on the part of the intervenor, plaintiff in the rule, did not suspend execution on the *fi. fa.*, said intervenor filed a petition of third opposition and prayed for an injunction, which was issued. To this proceeding an exception was filed, on the allegation that the grounds of action of the rule and of the petition for injunction were the same, and that the pendency of appeal on the rule supported the plea of *lis pendens* which was presented. This exception was properly maintained by the judge *a quo*.

Powhatan Wooldridge, Joseph A. Cire, subrogated v. *E. Monteuse, M. S. Hedrick intervenor*, 79.

2. This court will, of its own motion, dismiss an appeal for want of pecuniary interest in the appellant.

This is a controversy between the creditors of Barton, Miller & Co., for a certain sum of money attached by plaintiffs in the possession of the Home Mutual Insurance Company.

The fact that the president of the Home Mutual Insurance Company knew that the defendants, Barton, Miller & Co., had given J. M. Lewis & Co., intervenors in this case, an order or draft on their agent, Charles Clinton, which he agreed to pay out of the funds of the drawers when collected from the Home Mutual Insurance Company, did not divest the legal title of Barton, Miller & Co. in and to said funds, nor place them beyond the reach of their attaching creditors, the plaintiffs herein. If the Home Mutual Insurance Company had been the drawers instead of Charles Clinton, the agent of the drawers, or if the funds had been attached in the hands of Charles Clinton, the case would have been different, and the authorities cited by counsel would have been applicable.

Block, Britton & Co. v. *Barton, Miller & Co., and Peet, Yale & Bowling* v. *The Same. Lewis & Co. and Clinton, intervenors*, 89.

3. Where a rule was taken to set aside an attachment, on the ground that the suit was based on a partnership transaction, and therefore plaintiff was not entitled to an attachment, for the reason that he could not swear to the amount due, until the rights of the partners should be settled according to law;

Held—That the term partnership implies a community of goods, and a proprietary interest therein, which does not exist in this case. It was a mere consignment of goods, with an understanding that the profits and losses after the sale of the goods should be equally divided between plaintiff and defendants. The objection to the attachment, on the ground alleged, is therefore not well founded.

Where the question was whether the allegations in the petition and

ATTACHMENT—Continued.

in the affidavit were sufficient to warrant the issuing of the writ of attachment, and the plaintiff prayed for judgment for $3500, or such amount as should be found due according to said allegations, and where the affidavit was that "all the facts and allegations in the above and original petition were true and correct, and that the defendants were disposing of their goods, rights and credits, with intent to defraud their creditors;"

Held—That the allegations were sufficient, and that the affidavit was in conformity with law. *Frederick Belden* v. *Read & Hunt*, 103.

4. This is a claim for damages for the illegal attachment of the plaintiffs' vessel in the suit of Sibley, Guion & Co. *v.* Fernie Brothers & Co. There was no just ground for seizing this vessel as the property of Fernie Brothers & Co.. but there is some difficulty in fixing the damages to which plaintiffs are entitled. The true standard seems to be the expenses incurred and profits lost as the direct consequence of the seizure and detention, and as far as they are ascertainable on the part of the plaintiffs.

The British and American Steamship Navigation Company, Limited, et al. v. *Sibley, Guion & Co. et al.*, 191.

5. It matters not what informalities affect the sale from Mrs. Pope, one of the defendants, to the intervenor. As the plaintiff is not a creditor of the seller, he can not complain. If he has abused the harsh remedy of attachment, he can not escape liability by questioning the title given to the intervenor.

Joseph Moore v. *Mrs. Sallie Pope and husband. Willis J. Pope, intervenor*, 254.

6. This suit commenced by attachment. The proof is, that Jesse K. Bell leased his dwelling house and furniture; and that, declaring that it was his intention to be absent from the State for two years or longer, traveling for pleasure and health, he left the State without leaving any agent upon whom citation could be served. Shortly after he left, this suit was brought. At that time it would have been impossible to bring him into court except through his property. Under these circumstances the attachment was properly issued. The fact that he did not absent himself as long as he had expected did not affect the attachment previously issued.

Thomas P. Levthers v. *John W. Cannon and Jesse K. Bell*, 522.

See Garnishment and Garnishees, No. 7—*Phelps & Co.* v. *Boughton*, 592.

See Dation en Paiement, No. 2—*Shultz* v. *Morgan*, 616.

ATTORNEY AT LAW.

1. This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

ATTORNEY AT LAW—Continued.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State. P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff, at the time he did so.

But the judgment complained of was rendered also on the written consent of Frank Haynes, her attorney. His authority to consent to the judgment with a stay of execution until a certain specified time has not been denied under oath by the plaintiff, and until thus denied the defendant was not required to prove it.

The attorney was a sworn officer bound by his oath to act correctly in the pursuits of his profession. Thus situated, it is not to be presumed that he acted without proper authority. On the contrary, every presumption is in favor of his having pursued the proper course of conduct, unless the contrary should be suggested on affidavit.

In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular.

M. A. Dockham and Husband v. *Jonathan Potter*, 73.

2. An attorney at law can not allow claims which the legal representative of the succession, as in this case, never saw or heard of, much less allowed.

Succession of Francois Poussin—On rule of G. W. Banker and T. C. Payan, to destitute the Administratrix, 296.

3. Service of the order to give security was made in this case upon the attorney at law of the testamentary executor, said executor being at the time absent from the State. This is sufficient.

Succession of William Bobb, 344.

4. The right of an attorney to remuneration depends on a contract or appointment, and he can not recover from one who did not employ him, however valuable may be the result of his services to such person.

George Wailes and S. Mathews v. *Succession of James N. Brown*, 411

5. It is a rule long settled by this court that it will not be implicitly governed in regard to questions relating to the value of professional services rendered by attorneys at law to their clients, by the opinions of legal men taken in evidence, but will be guided by a conscientious estimate of the value of the services performed, and will, of itself, fix the amount, without reference to the opinions of witnesses.

Randolph, Singleton & Browne v. *Joseph W. Carroll*, 467.

ATTORNEY—CITY.

See Offices and Officers, No. 2—*State* v. *B. F. Jonas*, 179.

ASSUMPSIT.

1. Boudreaux purchased from Delaporte a certain piece of property, giving notes to the order of the vendor and secured by mortgage on the property sold. Afterward, Boudreaux sold to Villiers who, as a part of the price, assumed to pay said notes, one of which in suit herein was then held by plaintiffs. The property thus purchased by Villiers was sold at the suit of the creditors of Boudreaux before the institution of this suit. Under these circumstances, Villiers should not be held to pay the assumpsit, there being a failure of consideration.

Lapene & Ferre v. *Delaporte, Administrator, et al.*, 252.

ASSESSMENT.

1. The opponents to the homologation of the assessment roll presented by the commissioners of the First Draining District err in basing their opposition on the ground that some of the lands upon which the assessment in controversy is established, were drained at their cost under the provisions of Act No. 49 of 1839, and are by the thirteenth section thereof specially and forever exempted from any further assessment for draining. This section created no contract between the State and the opponents, by which their lands were exempted from the assessment under consideration

This assessment is not an *extra tax* within the contemplation of said thirteenth section, which made it the duty of the municipality of New Orleans to maintain the works erected by the draining company on the particular section drained, without ever levying an extra tax on the lands so drained, but only out of the funds arising from the general tax imposed throughout the municipality.

The act of 1861, No. 57, provided, as its title indicates, for the collection of the assessment for draining under the act of 1858 and the supplementary act of 1859, and it seems that the present proceedings were instituted in accordance with the provisions of the act of 1861.

The Legislature of 1871, in act 30, has legalized the assessments made by the three boards of commissioners under the said acts of 1858 and 1859, and other supplementary and amendatory acts, and authorized and directed the board of administrators of New Orleans to collect the balance due on said assessments, which the said administrators are now seeking to do.

The State, in ordering the draining, is exercising sovereign power, and can of course direct or authorize the work to be done in such way, and compensation made in such terms, as its discretion may deem best, restrained only by the fundamental principles upon

ASSESSMENT—Continued.

which the government is to be conducted; and nothing is found in those principles inhibiting the State from having the means provided for such a work in the way it is done in the present system of drainage in New Orleans. The existing laws clearly authorize the collection sought to be enforced, and no reason can be seen for judicial interference with the discretion of the State.

In the matter of the Commissioners of the First Draining District, praying for the homologation of the assessment roll, etc., 20.

2. Absence is no excuse for the noncompliance with the requirements of the law and for not objecting, within the proper time, to the assessment roll.

Serrill v. *The city of New Orleans*, 520.

See Taxes and Tax Collectos, No. 14—*State* v. *Peter Maxwell*, 722.

BANKRUPTCY.

1. This is a personal action against the owners of a steamboat, the vessel being seized to enforce a lien accorded by a State law, under the conservatory remedy of provisional seizure. It is not a proceeding *in rem* to enforce a maritime lien. Therefore there is no force in the objection that the State court was without jurisdiction.

The State court, having once obtained lawful jurisdiction over the parties and subject matter, could not be subsequently divested thereof by the bankrupt court.

Congress has not only not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those courts by the assignee in bankruptcy. This principle applies not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute or remains unascertained.

E. A. Switzer v. *John Heinn and Mary Heinn, Owners of the Steamboat Frolic*, 25.

2. This suit was brought to revive a judgment *in solido* against defendants, Nelson & Co., serving citation only on Nelson. In bar of the proceeding he pleaded his discharge in bankruptcy. It was a vain thing to cite him, because he could not be held personally liable, and whether or not a judicial mortgage should be perpetuated against the bankrupt's estate by reviving the judgment, was a question that might interest the assignee, the special representative of the ordinary creditors, but it in no manner concerned the bankrupt, who had surrendered his entire estate.

Charles E. Alter v. *S. O. Nelson & Co.*, 242.

3. Factors and commission merchants, when exercising their func-

BANKRUPTCY—Continued.

tions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intendment of the thirty-third section of the bankrupt act of 1867, and are not released from obligations contracted in that capacity by a discharge in bankruptcy.

To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established that it must be shown that the owner or consignor knew of such custom and usage and assented to it.

J. W. Banning v. *R. Bleakley & Co.*, 257.

4. The judgment of the lower court, predicated upon the ground that the proceedings in bankruptcy in relation to plaintiff in injunction are still pending, and that execution on the defendant's judgment can not legally issue until the final judgment of the bankrupt court decreeing a discharge of the bankrupt, or not, be rendered, is correct.

The defendants made themselves parties to the bankrupt proceedings, opposing the discharge of the plaintiff, and the matter remains undecided in the bankrupt court. He has the right to have the execution suspended until the final action of said court.

O. W. Keeting v. *Arthur, Stone & Co.*, 570.

See Jurisdiction, No. 15—*Switzer* v. *Zeller et als.*, 468.

See Mortgage, No. 12—*Heard* v. *Patton*, 542.

BILLS AND PROMISSORY NOTES.

1. The rule is that want or failure of consideration will be no defense or bar to the title of a *bona fide* holder of a note for a valuable consideration, at or before it becomes due, without notice of any infirmity therein.

A valuable consideration is one having value or worth, and it is not measured by any particular degree or amount. There must be value, but not necessarily full value, which is not always easily determined. The agreement of the parties must fix the value. A small price is value, and where it is not clearly a sham, must be accepted as valid. In this instance, this court can not say that the willingness of the holder of the notes before maturity to take one hundred dollars for said notes, which were each for $2500, was, of itself alone, notice to the purchaser of a want of consideration.

W. B. Scott & Co. v. *A. B. Seelye*, 95.

2. This is a suit on a mortgage note drawn by defendant, and lost in *transitu* from New York to New Orleans, to which latter place it had been sent for collection. The Citizens' Bank of Louisiana

BILLS AND PROMISSORY NOTES—Continued.

offered him a bond of indemnity if he would pay the note at maturity, which he declined. Under this statements facts;

Held—That the defendant is liable for the interest due on the note from the maturity thereof, for counsel's fees, and for the costs of the act of mortgage. He could have avoided them all by depositing, or tendering a deposit of the amount of the note when it fell due, and thus putting the plaintiff in default. But he is not liable for the costs of advertisement for the recovery of the lost note, as he can not be made to pay for either the misfortune or the negligence of plaintiff.

Citizens' Bank of Louisiana, for the use of the Phenix National Bank of New York v. *John Baltz*, 106.

3. The Teutonia National Bank was clearly without right to hold Loeb & Co's note, pledged to secure a particular debt of Gretzner, Winehill & Co. on account of any other indebtedness of that firm to the bank. When Loeb & Co., and also Gretzner, Winehill & Co. with them, offered to pay and take up the note of the last named parties, the bank upon receiving payment in full for that note should have surrendered the collateral.

Teutonia National Bank of New Orleans v. *H. Loeb & Co.*, 110.

4. Article 313 of the Revised Code and Article 964 of the Code of Practice do not authorize the appointment of a curator *ad hoc* for the purpose of receiving notice of protest, nor was the plaintiff required to serve notice on the curator who was not appointed as such until fifty-one days after the protest.

Neither the plaintiff nor the notary seem to have had any knowledge that, ten days before service of notice of protest, the heirs of the indorser of the note sued upon, had filed a petition for his interdiction, and no information in regard to it was communicated to the notary when he handed the notice of protest addressed to the indorser to his son-in-law at the residence of said indorser.

At the time of the protest, no legal representative having been appointed for the indorser, the notice addressed to him and left at his domicile on the day of protest was sufficient to fix his liability. The plaintiff, through the notary, had exercised reasonable diligence and given such notice of protest as under the existing state of facts the law required to be given.

Mrs. Estelle Rosa Weaver v. *D. B. Penn. and Alfred Penn*, 129.

5. In this case the notes given by defendant for the price of a certain piece of property were made the debt of the firm composed of plaintiff and defendant by the act of partnership and purchase, but the notes given by each partner to represent the cash which each agreed to advance as the capital of the partnership were and are

BILLS AND PROMISSORY NOTES—Continued.

the individual debt of each partner, and neither one is responsible for the notes of the other unless he expressly made himself liable therefor. The fact that the interest on such notes was paid by the firm and charged to the maker does not make the notes the debt of the firm, nor would the payment of said notes out of the interest of each partner in the partnership have such effect.

Jacob F. Wild v. *Albert Erath*, 171.

6. This is a suit brought against defendant on a note drawn by him, and pledged as security to plaintiff by Carlos, Marks & Co. for the payment of three of their notes. The defense is that the defendant has paid two of the notes, and has tendered the plaintiff the amount of the last one, for which the instrument sued on was given in pledge, it being a note signed for accommodation and without consideration, for the benefit of the pledgors.

The plaintiff knew that the pledge was an accommodation note. In law and equity, therefore, the defendant ought not to be required to pay more than the amount for which the pledge was given, to wit: the three notes discounted by Carlos, Marks & Co., and ought not to be extended to cover money overdrawn by said Carlos Marks & Co. But a formal real tender of the money having not been made as required by law, defendant can not be exonerated from interest and costs.

Mechanics' and Traders' Bank v. *J. Barnett*, 177.

7. There is no law that authorizes plaintiffs to claim interest on the bills issued by the city as currency; nor is there any that sanctions their claim to interest on the warrants held by them, which, as well as the city notes, they have funded.

The assent of the Mayor that the plaintiffs should receive bonds in lieu of the securities funded at their face value, and reserve for judicial investigation their claim for interest, was not binding on the city.

The rights of the plaintiffs were fixed by a statute. They were authorized to exchange securities that bear no interest for bonds of like amounts that do bear interest. This they have done, and can claim no more.

Sam Smith & Co. v. *City of New Orleans*, 187.

8. The defense that the indorser of a promissory note was released by the fact that the bank, without his knowledge or consent, gave up a warrant which had been pledged as collateral security, must be sustained. The indorser contends very properly that he could have made the warrant available, had it been retained and he required to pay the debt.

Union National Bank v. *Cooley and Labatt*, 202.

BILLS AND PROMISSORY NOTES—Continued.

9. This is a suit on two promissory notes with mortgage, drawn by defendant, and given as collateral security for advances made in plantation supplies. There is no evidence of fraud or bad faith on the part of the plaintiffs in regard to the possession of said notes, which were negotiable and were transferred by delivery. Gay & Co., it is true, had limited the amount of these advances to $10,000. But the defendant exceeded this limit, and pretends not to be responsible for said excess. She can not be permitted to take advantage of this act of her own, and Gay & Co. have the right to cause the property mortgaged to be sold so as to satisfy the amount due them for advances made to the defendants.

Edward J. Gay & Co. v. *Mrs. Solidelle Deynoodt et al.*, 249.

10. Beals & Laine are sued as makers and Edward Beals as indorser of a promissory note. E. Beals' son, a member of the firm of Beals & Laine, wrote the name of his father, who can not write, as indorser of said note. The evidence showing that Edward Beals subsequently ratified the act or adopted the indorsement, this is sufficient to bind him as indorser.

George Lysle and Son v. *Beals & Laine et al.*, 274.

11. At the time of the discount of the note which is the subject of the present controversy, Hunter, one of the firm of Callender & Hunter, according to the import of his own evidence, was utterly without authority to do so. He had no right to indorse and discount a note belonging to Callender, the plaintiff, and payable to his order, it matters not how much Callender might owe the late firm of Hunter & Callender. If Callender had given him verbal authority, as contended by defendants and intervenors, the authority was revoked before exercised. But, even without a revocation, Hunter had no authority to indorse and discount the note in question.

Authority to indorse and discount a note for one purpose can not be extended to another.

As Hunter had no title to the note, his indorsees acquired none, because they had notice of the want of authority in Hunter to indorse and negotiate it.

R. K. Callender v. *Golsan Brothers. Jackson & Manson, Warrantors and Intervenors*, 311.

12. The motives which influence a person to exercise a legal right do not destroy that right or affect its enforcement.

A valuable consideration may, in general terms, be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility or act, or labor or service on the other side;

BILLS AND PROMISSORY NOTES—Continued.

and if either of these exist, it will furnish a sufficient valuable consideration to sustain the making or indorsing of a promissory note in favor of the payee or other holder.

Milton Benner v. *Warner Van Norden et al.*, 473.

13. The extension of the time of payment of a certain mortgage note was really the consideration of the note in suit, and this was a lawful consideration. *Mrs. M. A. Foster* v. *Wm. H. Wise*, 538.

14. One holding a note as collateral security or as a pledge, to the extent of his debt, is the owner of the obligation for all practical purposes. It is not shown, in this case, that the debt to be secured is less than the amount of the note, even if it had been shown that plaintiffs held it as a pledge.

The note being negotiable and having been acquired before maturity by the plaintiffs, the equities between the original parties can not be noticed in this suit. When one of the parties must bear a loss, he who has made it possible must suffer.

In this instance, the mortgage is accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the accomplishment; and it follows that the principal obligation, like a shadow, follows its substance.

A mortgage may be given for an obligation which has not yet risen into existence, and the provision of law which says "that the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it," applies only to cases between the parties to the contract, or in which the principal obligation is not negotiable.

L. H. Gardner & Co. v. *J. D. Maxwell*, 561.

15. The note sued upon was negotiable in form and was the maker's unconditional promise to pay the amount stated therein. When plaintiff received it from Mayer, indorsed "without recourse" on him, he took it at his own risk, and the indorser is not liable because of the defense of Confederate money consideration successfully pleaded by the defendant. The note was given in novation, indorsed "without recourse," and the indorser has not been notified of its dishonor by the maker. Even without this limitation in the indorsement, under the rules of commercial law, the indorser who has not been notified of non-payment at maturity can not be made liable.

R. W. Rayne v. *W. L. Ditto. Lazarus Mayor, Warrantor*, 622.

16. The defendant was bound as accepter. No notice of protest was necessary to fix his liability either as surety or accepter. A loan of money was made by plaintiff to Sturgess, and the draft of Sturgess for that amount was drawn upon and accepted by Leonard to

BILLS AND PROMISSORY NOTES—Continued.

enable Sturgess to get the money he wanted from plaintiff, who, to the defendant's knowledge, would not have loaned the money without security, and who rested upon the defendant's acceptance as securing the amount loaned to Sturgess. Under no aspect of the case can there be any weight in the defense.

J. W. Fuller v. *A. H. Leonard*, 635.

17. A bill was drawn by A. Flournoy to his own order upon Thurmond and Hicks and Martin Tally, and by them accepted for $1125, which bill was indorsed by Duncan. Thurmond and Hicks, joint acceptors with Tally, paid on the second February, 1871, one-half of the amount of the bill, principal and interest then due, and were released from further liability by the plaintiff, holder of the bill. He now claims from defendants, *in solido*, Martin Tally, as accepter, and Duncan as indorser, the remainder due.

The defense, on the part of Tally, that plaintiff should have exhausted his legal remedies against the drawer and the accepters, Thurmond and Hicks, is not tenable under the rules of the law merchant. Tally and Thurmond are jointly bound as between themselves, but each is bound to the holder for the full amount. As to the indorser, Duncan, he is released by failure to serve legal notice upon him of the protest of the bill.

McNabb v. *Tally and Duncan*, 640.

See Partnership, No. 5—*Cottam* v. *Smith & Co.*, 128.

See Pledge, No. 1—*Davidson & Hill* v. *Bodley*, 149.

See Assumpsit, No. 1—*Lapene & Ferre* v. *Delaporte*, 252.

See Partnership, No. 8—*Carrie A. Drake and Husband* v. *Hays et als.*, 256.

See Contract, No. 3—*Chastant* v. *Elliot*, 322.

See Tutorship, No. 4—*Coons* v. *Kendall*, 443.

See Pledge, No. 3—*Louisiana Savings Bank and Safe Deposit Company* v. *Bussey*, 472.

BILL OF LADING.

1. The plaintiff sues defendant for a certain sum of money on a contract of affreightment concerning the transportation of slaves, for which he signed a bill of lading. After signing, he protested against it. This was too late. If his allegations are true, he should not have signed the bill of lading, or if he did, he should have protested at the time.

James S. Rogers v. *Robert Roberts*, 85.

BOARD OF LIQUIDATORS.

See Bonds, No. 10—*State ex rel. Citizens' Bank of Louisiana v. Board of Liquidators*, 660.

BONDS.

1. In this instance the main ground of the defense seems to be, that the judgment appealed from was against these defendants *in solido*, and it was so changed by this court as to discharge one of them, the Delta Newspaper Company, and hold the other two liable jointly and not *in solido*, and therefore the surety is not liable for the amount of the judgment so rendered. The Code of Practice provides that the appellant shall satisfy whatever judgment may be rendered against him, and that the surety shall be liable in his stead. The language used is plain and expressive—that the surety's liability is to be just that of his principal, to pay and satisfy the final judgment of the appellate court whatever that may be. The condition of the bond signed by the surety in this case is the one required by law. The defense he sets up is more specious than weighty.

Culver, Simonds & Co. v. *Leovy, Hart et al*, 58.

2. There is no law that authorizes plaintiffs to claim interest on the bills issued by the city as currency; nor is there any that sanctions their claim to interest on the warrants held by them, which, as well as the city notes, they have funded.

The assent of the mayor that the plaintiffs should receive bonds in lieu of the securities funded at their face value, and reserve for judicial investigation their claim for interest, was not binding on the city.

The rights of the plaintiffs were fixed by a statute. They were authorized to exchange securities that bear no interest for bonds of like amounts that do bear interest. This they have done, and can claim no more.

Sam Smith & Co. v. *City of New Orleans*, 187.

3. Until the judgment appealed from be disposed of by this court, which has granted relators a suspensive appeal, the property of the succession being in the custody of the executor and under the control of the parish court, and no moneyed judgment having been rendered against said relators, who do not seek to suspend the execution of any such judgment, it follows, under this statement of facts, that a bond for costs is all that they should be held to give.

State ex rel. Mrs. Charles Pecot et als. v. *Parish Judge of the Parish of St. Mary*, 231.

4. The indorser of a note having obtained a suspensive appeal from a judgment against him as such, and having given as surety on the appeal bond the maker of the note, against whom a separate judgment was rendered in the same suit, and the parties having severed in their defense;

Held—That in cases previously decided, the sufficiency of such a

BONDS—Continued.

surety was maintained, the surety and principal not being coappellants, and the former having all the requisites prescribed by the law.

State ex rel. John Coleman v. *Judge of the Sixth District Court, parish of Orleans*, 234.

5. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign reciprocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

Isaac F. Riley v. *Heirs of E. M. Riley*, 248.

6. There is a wide difference between the bonds issued in the name of and payable by an important political corporation and an individual promissory note. Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given.

Where, as in the contract of sale relied on in this instance, payment was made in bonds, it was as if the price had been paid in current money. The language of the contract and of the act itself, on which it is based, implies such an intention, and indicates that it was meant to give a full discharge of the debt, without the reservation of any lien or privilege to secure the bonds at maturity.

Smith & Co. v. *The City of New Orleans and Recorder of Mortgages*, 286.

7. This is a suit against the succession of John Armstrong, who is alleged to have been security on a bond given by one J. G. Campbell, as secretary and treasurer of the Canal and Claiborne Streets Railroad Company. As there is no sum fixed in the penal clause of the bond, the instrument contains no written promise on the part of Armstrong to pay any particular amount. Therefore his succession is not liable on the bond. As no amount is fixed in said bond, there is no evidence that the parties ever came to an agreement as to the extent of the obligation of Armstrong. The contract was incomplete.

Assuming that the signing and delivery of the instrument authorized or implied authority granted to the holder to fill in the amount—which this court does not admit—the death of Armstrong revoked the mandate and no sum has been filled in.

It has frequently been held that omissions in filling judicial bonds

BONDS—Continued.

are supplied by the law. But in the case at bar the bond is in no sense judicial. It is an ordinary conventional bond given by an officer of a corporation for the faithful performance of his duties, and as the surety promised to pay no specific sum, there is no obligation for this court to enforce.

Canal and Claiborne Streets Railroad Company v. *Succession of John Armstrong*, 433.

8. It seems settled by our jurisprudence that where no law authorizes the execution of a judicial bond, no force can be given to it. The order of the judge authorizing the intervenors in this case to release property under sequestration by executing a bond, gives no validity to the bond, because there is no law authorizing intervenors to release property under sequestration by furnishing bond.

Annie Alexander and Husband v. *B. Silbernagle et al.*, 557.

9. The relator is the holder, for various persons, of bonds known as the Levee Bonds, and of other bonds issued for "paying certain debts" under the act of fifteenth of February, 1866. He prays for a mandamus compelling the board of liquidators to fund his bonds. Critically considered, he rests his rights so to do upon the sole ground that the act of the Legislature, No. 11, of the session of 1875, is unconstitutional. The issue is made up by the answer of the board, as well as of the State, which denies the validity and legality of the bonds. That issue is, whether the act No. 11, acts of 1875, conflicts with the amendment to the constitution adopted in 1874, and the act No. 3, of the acts of 1874, which this amendment was intended to make irrepealable and unalterable by a subsequent Legislature.

All holders of bonds issued by the board under the act of 1874 are protected in their rights. The Legislature can pass no law affecting their validity; for this would be impairing a contract already consummated.

But the relator has made no contract with the State under this act. His bonds are not bonds issued under this statute. He asks that bonds be given him in exchange for those he holds.

There is nothing unconstitutional in an act of the Legislature which gives to the citizens of the State the right to see that no claim set up against it shall be passed until the validity thereof is ascertained. There is no violation of any contract with the relator by the act in question, because, at the time the act was passed, no contract existed under the act of 1874 between him and the State. The bonds he holds now are in the same condition that they were prior to the passage of either of the acts now under consideration.

The act No. 11 of the acts passed at the extra session of the Legisla-

BONDS—Continued.

ture of 1875 and approved on the seventeenth May of the same year does not conflict with the amendment to the constitution adopted in 1874, and is therefore constitutional.

The levee bonds in the possession of the relator are valid obligations against the State, and should be funded.

In so far as relates to the bonds alleged to have been issued under the statute approved February 15, 1866, the application of the relator to have them funded must be dismissed on account of a discrepancy in the proof of their issuance which can not be supplied.

State ex rel. Oscar J. Forstall v. *The Board of Liquidation*, 577.

10. This is a proceeding by mandamus to compel the Board of Liquidators to fund a certain promissory note for two hundred thousand dollars with eight per cent. interest made by the Governor of the State on the twenty-seventh of February, 1872, and secured by a pledge of forty warrants of five thousand dollars each, subject to a credit of $120,000, amount of bonds received in exchange for said warrants under act No. 3 of 1874, known as the "Funding Act."

The law does not make it the duty of the liquidators to exchange the bonds authorized by act No. 3 of 1874 for anything but the bonds of the State and certain warrants specified in section 3.

Section 3 of said act is the only part thereof that confers authority to make such exchange, and it designates only "all valid outstanding bonds of the State and valid warrants drawn previous to the passage of this act by the respective auditors, except warrants issued in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants."

The words "bonds and warrants" are here repeated to leave no doubt as to the object of the law, and the proviso which immediately follows declares: "That the holder of any bond or warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided for by this act." Therefore only the holders of outstanding bonds and valid warrants can appeal to the courts for relief.

Lest there should be any doubt, section five declares "that the consolidated bonds herein authorized shall be held and used by said Board of Liquidators only for the purpose of exchange as aforesaid"—that is, for the outstanding bonds and valid warrants.

The relator having voluntarily accepted the terms of the law and taken sixty per cent. of its whole claim against the State by fund-

BONDS—Continued.

ing the warrants held by it, the purpose of the act as to said debt has been attained, and the whole and only debt of the State due to the relator in this transaction has been funded, and the indebtedness of the State, *pro tanto*, has been reduced and restricted according to the intent and object of the act.

State ex rel. Citizens' Bank of Louisiana v. *Board of Liquidators*, 660.

SEE APPEAL, No. 29—*State ex rel. Temple S. Coons* v. *Judge of the Superior District Court*, 334.

SURETY, No. 6—*New Orleans, Mobile and Chattanooga Railroad Company* v. *Dugan*, 465.

BROKERS.

SEE OBLIGATIONS AND LIABILITIES, No. 17—*Todd* v. *Bourke*, 385.

CARRIERS.

1. The act of the Legislature of Louisiana, No. 38 of the session of 1869, is not in conflict with article 1, section 8, of the constitution of the United States, nor is it in conflict with article 14, section 1, of said constitution. Act No. 38 does not undertake to regulate commerce. The first section of act 38 forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race and color. That is the substance of the section so far as applicable to this case. It was enacted solely to protect the newly enfranchised citizens of the United States within the limits of Louisiana, from the effects of prejudice against them. It was not in any manner to affect the commercial interests of any State or foreign nation, or of the citizens thereof.

The above mentioned act, No. 38 of the session of 1869, does not violate section 1 of article 14 of the constitution of the United States. No one is deprived of life, liberty, or property, without due process of law by said statute. The position that, because one's property can not be taken without due process of law, therefore a common carrier can conduct his business as he pleases, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy.

In truth the right of the plaintiff to sue the defendant for damages would be the same, whether act No. 38 existed or not. But the act is in perfect accordance with the constitution of the United States.

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law is reasonable. *Mrs. Josephine Decuir* v. *John G. Benson*, 1.

CARRIERS—Continued.

2. The rule seems to be generally adopted and sanctioned, that in order to render the carrier liable for losses of baggage or goods shipped as freight, they must be delivered and entrusted to the carrier; and in regard to baggage the liability of the carrier does not extend beyond the value of reasonable articles of apparel or convenience according to the passenger's condition in life and the journey undertaken by him, and for such sum as might be deemed necessary for his expenses.

Mrs. Ellen Yznaga Del Valle and Husband v. *Steamboat Richmond and Owners*, 90.

3. Passengers have the right to require to be set on shore safely while disembarking, and they are not subjected to the hard lot of encountering dangers gotten up by those whose business it is to provide for their safety in leaving the boat. There should be no necessity existing for them to look out, or to jump from one stage to another in order to save life or limb.

Common carriers are bound to carry their passengers safely and securely, and to use the utmost care and skill in the performance of these duties, and, of course, they are responsible for any even the slightest neglect.

The burden of proof is on the defendants to establish that there has been no disregard whatever of their duties, and that the damage has resulted from a cause which human care and foresight could not prevent.

Laurent Julien v. *Captain and Owners of Steamer Wade Hampton*, 377.

CITATION.

See Attachment, No. 1—*Wooldridge* v. *Monteuse*, 79.

See Garnishment and Garnishees, No. 4—*Dupierris* v. *Hallisay*, 132.

See Practice, No. 10—*Anderson* v. *Arnette et als*, 237.

See Bankruptcy, No. 2—*Alter* v. *Nelson & Co.*, 242.

See Judgment, No. 5—*Isaac F. Riley* v. *Heirs of E. M. Riley*, 248.

See Judgment, No. 6—*Alter* v. *McCullen*, 251.

See Jurisdiction, No. 12—*Succession of William Bobb*, 344.

See Prescription, No. 7—*Nicholson & Co.* v. *Jennings*, 432.

CHECKS ON BANKS.

1. The check, the amount of which plaintiff, in her capacity of testamentary executrix, seeks to recover as having been embezzled by one of the defendants, Mrs. Risley, was not of Hampton Elliott, whose succession she represents, but was a check drawn by Britton and Kountz to the order of said Elliott. The moment Elliott

CHECKS ON BANKS—Continued.

indorsed it and handed it to Mrs. Risley, his property in it ceased. It was not his money which the bank paid when it paid the check after his death. It was Britton and Kountz's money. The bank paid under instructions from them and not under any mandate from Elliott.

A check is not an obligation. It is an unconditional order to pay. It, in fact, represents money, and to all practical intents is money. When, therefore, Elliott gave the check in question, indorsed by him, to Mrs. Risley, it was money which he gave her, and which she reduced to her possession when she took it.

Mrs. Virginia C. Burke, Testamentary Executrix, v. *Mrs. Clarissa Bishop and Mrs. Risley*, 465.

CHARTER PARTY.

1. This is a suit to recover the penalties stipulated in two charter parties, for the violation thereof, in relation to voyages to be made by two different vessels.

The putting in default was sufficient as to one of the vessels, but there is no proof that either of the modes for putting in default pointed out in article 1911, R. C. C. No. 2, was observed in relation to the other vessel, until the day the contract expired, when it was impossible for the vessel to execute her voyage on, or previous to, that day. The defendants are therefore liable jointly and *in solido*, as they bound themselves, only for the infraction of the contract as to one of the vessels.

Henry Eden v. *F. Lemandre et als.*, 176.

2. The charterer when he has complete control of the vessel, as in this case, is *pro hac vice* owner, as to parties dealing with him in such capacity, but he is not such in a contest with the actual owners for the value of the vessel and on the terms of the charter party. In such contest the burden is on the owners to prove the negligence of the charterer.

The authorities relied on in this instance by plaintiffs refer to the responsibility of owners as common carriers, and most of them are based on the act of Congress declaring the fact of explosion to be full *prima facie* evidence of negligence on the part of the defendant; while this is an action by the owners against their lessee for the value of the property hired by them to the latter. The evidence on this occasion does not show that the defendant as lessee violated the obligations imposed upon him by article 2710 R. C. C.

George E. Wilkinson and Frank Behan v. *Joseph Dalferes and Joshua M. Johnston et als.*, 379.

CLERK'S FEES.

See Offices and Officers, No. 8—*Fitzpatrick* v. *City of New Orleans*, 457.

COMMUNITY.

1. After the decease of his wife, the plaintiff, administrator of community property, gave to A. Ledoux his note for a community debt, and mortgaged a tract of land belonging to the estate to secure its payment. The executrix of A. Ledoux obtained judgment, issued execution, and caused a seizure to be made. The plaintiff, as administrator, enjoins the sale. The record shows that the estate has not been settled up; there are debts outstanding against it besides the one for which the administrator gave his note. Under such circumstances, the seizing creditor could expect only to be paid concurrently with other creditors of the estate in the due course of administration. His proceedings are illegal and irregular.

   Lovel Ledoux, Administrator, v. *J. E. Breaux, Sheriff, et als.*, 190.

2. The assets shown as composing the separate succession of Mrs. Clark being her separate property, distinct from the assets of the succession of her husband, the opponent can not claim payment out of these assets for his debt, which is a community debt due by the community estate.

   Successions of George and Frances Clark—On opposition to the account of the Executrix, 269.

3. By the marriage contract of plaintiff with her husband, the community was modified so as to exclude the Blackwater plantation and its fruits from the community. This was permitted by article 2421 C. C. The cotton seized was raised on the plantation, and the horses also seized were by destination a part of the Blackwater plantation. Hence the injunction was lawfully taken and must be perpetuated.

   Mrs. A. M. Barrow et al. v. *J. H. Stevens, Sheriff, et als.*, 343.

4. This is a suit in injunction prohibiting defendant from suing plaintiff, or foreclosing his mortgage as vendor, and praying for the rescission of the sale of a tract of land, on the ground of defective title.

   The plaintiff has failed to set forth a cause of action in her petition. It has been settled that the surviving husband, the head of the community, may sell community property after the death of his wife. The title of the property, in this instance, stands in the defendant's name on the records of the parish where the property is situated, and *he* is *personally* bound for the debts of the community. Besides, plaintiff is not disturbed in her possession, or threatened with eviction.

   Julia Williams and Husband v. *J. W. Fuller*, 634.

SEE SUCCESSION, NO. 5—*Smith & McKenna* v. *Charles*, 503.

COMPENSATION.

1. The duties of the defendant, while acting in his official capacity of wharfinger, were fixed by law. Compensation is an equitable remedy, and never takes place when it would be against good conscience. This case is similar to the case of City of New Orleans *v.* Finnerty et al., previously decided, and must be controlled by the principles therein announced.

City of New Orleans v. *E. V. Fassman et als.*, 650.

2. Compensation takes place between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debt is the same. It can not be opposed by a fiduciary acting in the line of his duty.

There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to said agent.

No officer of a government, State or municipal, is empowered to pay himself his salary or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof, and to get his pay as other officers get theirs. In other words, he can not pay himself.

The Administrator of Commerce for the city of New Orleans had no power to authorize the defendant, a wharfinger for the second district of said city, to retain a sufficient sum out of the moneys collected by him to pay his salary and also other employes in the office, and expenses of office. That the same thing has been done in other instances is no justification. Custom can not supersede the law in such cases. If it be a custom, it is a vicious one.

City of New Orleans v. *Martin Finnerty*, 681.

CONTRACT.

1. Where the terms of the contract for building were, that "no extra was to be admitted or allowed for, unless executed under written authority, and all omissions, additions or alterations should be estimated for, and the value thereof agreed upon by the superintendent, and added to or deducted from the contract sum, as the case may be, by an indorsement, or no allowance for the same shall be made by the other party."

Held—That certain items of extra work claimed by plaintiff, could not be proved by parol evidence under the contract, and second, because they were outside of the contract, in no manner connected with the specifications in the contract, and contrary to the allegations in the petition. *John Page* v. *Nicholson & Co.*, 116.

CONTRACT—Continued.

2. The difficulty in this case arises from the loss of a counter letter or private agreement existing between the plaintiffs and defendant, or rather from their disagreement in regard to the contents thereof. The bills of exceptions as to the parol proof of the contents of the counter letter or written agreement between the litigants herein were not well taken, a sufficient foundation having been laid to authorize the admission of secondary evidence.

An unreasonable contract is not to be supposed probable. It is not to be presumed that plaintiffs, who were merchants and business men, would have consented to advance large sums of money to cultivate a plantation for defendant's benefit, and themselves incur all the risks and losses attending the enterprise if not successful.

Payne & Harrison v. *Mrs. H. A. Stackhouse*, 185.

3. In this suit, instituted by plaintiff, the nullity of the proceedings of defendant in Iberville against plaintiff, is set up on the ground that plaintiff was an absentee, was not cited and had no knowledge of the suit brought against him there. Whether the proceedings in Iberville were regular or not is immaterial, inasmuch as plaintiff makes at the domicile of defendant the issue of the validity of the sale by defendant to him and prays judgment decreeing him to be the owner of the object sold.

The mules, which are the subject of this controversy, having been sold to plaintiff upon his promise to pay for them by a note well indorsed, payable at one year from date, bearing interest and being equivalent to cash, and after the shipping of the mules by the vendor according to the directions of the plaintiff, the latter having delivered to said vendor a note, both the drawer and indorser of which were insolvent at the time, thus making said note utterly worthless to the knowledge of plaintiff, the consideration of the contract fails and the sale must be annulled and set aside.

John Chastant v. *Joseph Elliott*, 322.

4. There was a total failure on the part of defendant to deliver at Havana, island of Cuba, certain articles contracted for. The interference of the military power of the government at the time has relieved him from the stipulated penalty in case of failure, but he must return the portion of the price received by him for the articles not delivered. *J. Denny* v. *H. Simons*, 438.

SEE BOND, No. 7—*Canal and Claiborne streets Railroad Company* v. *Succession of Armstrong*, 433.

CORPORATION, No. 4—*City of Shreveport* v. *Mary M. Waples and Husband*, 636.

CONSTITUTION.

1. The act of the Legislature of Louisiana, No. 38 of the session of 1869, is not in conflict with article 1, section 8, of the constitution of the United States, nor is it in conflict with article 14, section 1, of said constitution. Act No. 38 does not undertake to regulate commerce. The first section of act 38 forbids those engaged in the business of common carriers of passengers from discriminating against the passengers on account of race and color. That is the substance of the section so far as applicable to this case. It was enacted solely to protect the newly enfranchised citizens of the United States within the limits of Louisiana, from the effects of prejudice against them. It was not in any manner to affect the commercial interests of any State or foreign nation, or of the citizens thereof.

The above mentioned act, No. 38 of the session of 1869, does not violate section 1 of article 14 of the constitution of the United States. No one is deprived of life, liberty, or property without due process of law by said statute. The position that, because one's property can not be taken without due process of law, therefore a common carrier can conduct his business as he pleases, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy.

In truth the right of the plaintiff to sue the defendant for damages would be the same, whether act No. 38 existed or not. But the act is in perfect accordance with the constitution of the United States.

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law is reasonable. *Mrs. Josephine Decuir* v. *John G. Benson*, 1.

2. The second article of the city ordinance to regulate the levee dues and wharfage on ships and vessels arriving from sea, and on steamboats, flatboats, etc., arriving at the port of New Orleans, approved February 11, 1853, which provides, "that from and after the first of January, 1855, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as stated in said ordinance," is not in conflict with the provisions of the constitution of the United States.

J. W. Cannon v. *City of New Orleans*, 16.

3. Under a title to make appropriations for the general and current expenses for the year ending thirty-first of December, 1874, an appropriation for an expense or debt incurred prior to that time

CONSTITUTION—Continued.

can not be made, because the object is not expressed in the title, as required by article 114 of the constitution.

Besides, the claim of plaintiff can not be enforced, because at the time it was incurred, the total debt of the State exceeded the limit fixed in the amendment of the constitution.

State ex rel. Wm. W. Howe v. *Charles Clinton, Auditor—State of Louisiana, Intervenor*, 40.

4. The franchise of the plaintiff is property, and it has been injured in the enjoyment thereof by the claims and pretensions of the defendant, founded on a statute alleged to be unconstitutional and void. It is true, the right of the plaintiff to make and vend gas will begin on the first of April, 1875, but the right to sell shares of its capital stock, to the amount of three millions of dollars and the duty to erect works, buildings, machines, lay gas pipes, and prepare every thing necessary to begin the enterprise or business, vested the moment the corporation began.

A void title set up to defeat plaintiff's right to prepare for their business, invades their charter as effectually as if set up to obstruct the business after it had begun.

This is not an action of damages under article 2315 of the Revised Code. The plaintiff has shown an injury, and if there is no express law giving a remedy, it can appeal to the equity powers of the court for redress. Revised Code, article 21. The exception to the petition of plaintiffs on the ground that it discloses no ground of action can not be maintained.

Crescent City Gaslight Company v. *New Orleans Gaslight Company*, 138.

The purpose to extend the charter of the New Orleans Gaslight Company for twenty years from the first of April, 1875, is no more disclosed in the title of the act, entitled "An Act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by consumers," than the purpose to create a new corporation for making and vending gas is indicated therein. The prolonging of defendant's corporation for twenty years virtually gives a new charter for that period. Moreover, the title is deceptive and calculated to mislead the mind from the true object of the statute. Hence, the statute is repugnant to article 115 of the constitution of 1852 then in force and is therefore void.

Nothing but a valid statute of the State could confer the grant extending the charter of the defendant until 1895, and the act of March 1, 1860, which had that object in view, being unconstitutional, was utterly void from the beginning.

The act incorporating the plaintiff's company, conferring on it the

CONSTITUTION—Continued.

sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years from the first of April, 1875, is not repugnant to article 114 of the constitution of 1868 then in force, requiring the object or objects of every law to be embraced in the title. The object of the act, as stated in the title was: "to incorporate the Crescent City Gaslight Company." To incorporate a company is to create it with certain powers and privileges. These powers and privileges need not be detailed. The title of the act disclosed the creation of a gaslight company. This was sufficient to cover the monopoly or exclusive privilege to make and vend gas.

An exclusive privilege or monopoly, can be granted under the usual title to incorporate a company. The grant of the monopoly complained of in this case does not violate the constiution, and is valid. *Ibid*, 138.

The State, intervening, not to set up some separate right of its own, but solely for the purpose of upholding the rights of the plaintiff against the defendant, in regard to a franchise granted by itself, has no interest whatever in the controversy, and the court below did not err in dismissing the intervention.

In regard to the intervention of the city of New Orleans, the right reserved by the State for it to become the purchaser of the gas works, fixtures, etc., at the expiration of the charter of the defendant, was not such a vested right that the State could not withdraw or recall, without contravening that provision of the constitution of the United States prohibiting a State from impairing the obligations of a contract.

Even conceding that the authority given to the city, if she saw fit, at the expiration of the defendant's charter, to purchase the gas works, by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived, and the grant of the right and exclusive privilege to plaintiff to make and vend gas, is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. This grant by implication revokes or recalls any previous authority given the city to buy the gas works of defendant on the first of April, 1875. This is violating no contract protected by the constitution of the United States. The intervention of the city can not be maintained. *Ibid*, 183.

5. It has been decided by this court that the express grant of authority in article 118 of the constitution, to exempt from taxation property actually used for church, school, or charitable purposes,

CONSTITUTION—Continued.

by implication prohibits the General Assembly from exempting property not actually used for such purposes.

The exemption from taxation of property used for certain purposes, expressly granted in the constitution, or in a law specially authorized by the constitution, means an exemption from all taxation, municipal as well as State. It means a complete, and not a partial exemption, and this limitation must apply to the power of taxation previously delegated to the municipal corporations of the State.

Mr. and Mrs. Lefranc v. *City of New Orleans*, 188.

6. The only objection urged by plaintiff to the sale in this case is that the price was paid in Confederate money.

There are three grounds fatal to the objection:

First—The contract by which the defendant acquired the property in 1864 was an executed judicial sale, which is protected by article 149 of the constitution of 1868.

Second—The plaintiff, by receiving $350 of the proceeds in national currency, being the estimated value of the Confederate notes received as the price, ratified the sale.

Third—The plaintiff can not keep the price or any part thereof, and claim the thing sold. *Sarah S. Tilsen* v. *Catharine Haine*, 228.

7. The joint resolution of the Legislature upon which defendant relies in this case and the title of which is: "A joint resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama," sufficiently discloses the object of the resolution. It is not therefore unconstitutional.

The city of New Orleans v. *New Orleans, Mobile and Chattanooga Railroad Company*, 414.

8. The mayor and selectmen of the town of Homer could not do any thing which they were not authorized to do by the statute from which they derived their powers, and this statute expressly prohibited them from imprisoning any person for any period beyond the time necessary for the offender to become sober, or until he should desist from violence. Therefore the ordinance which extends the imprisonment to ten days is illegal, and when the mayor sentenced the defendant to an indefinite imprisonment, that is, until he paid a certain fine, his judgment was doubly wrong, for it condemned under an illegal ordinance, and went much farther than the ordinance itself permits.

As the act of the Legislature under which the ordinance under consideration was enacted, was passed in 1874, its constitutionality must be tested by the constitution of 1868. Constructing together articles 73, 89, 94 of that constitution, it follows that the ordinance

CONSTITUTION—Continued.

under which this action is brought, is illegal and unconstitutional, so far as it permits the mayor of Homer to imprison the defendant as he did, but not so far as it allows him to impose the fine which he fixed.

The Mayor and Selectmen of the Town of Homer v. *John B. Blackburn*, 544.

9. The defendant bank having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the State under previous laws on the exemption from taxation, and there is no conflict with the constitution in levying the present tax.

City of New Orleans v. *Metropolitan Loan, Savings and Pledge Bank*, 648

See Taxes and Tax Collectors, No. 4—*City of New Orleans* v. *Cazelar*, 156.

See Homestead, No. 5—*William Doughty* v. *Sheriff et als.*, 355.

See Taxes and Tax Collectors, No. 10—*City of New Orleans* v. *Bank of Lafayette*, 376.

See Mortgage, No. 8—*Mathilde Morrison* v. *Citizens' Bank et als.*, 401.

See Markets, No. 1—*City of New Orleans* v. *James Stafford*, 417.

See Bonds, No. 9—*State ex rel. Forstall* v. *Board of Liquidators*, 577.

See Offices and officers, No. 13—*State* v. *Pete Phillips*, 663; and No. 14—*State* v. *George Fritz*, 689.

CORPORATIONS.

1. The rule seems to be that the powers of all corporations are limited by the grants in their charters and can not extend beyond them. But, if to provide for the relief of the indigent, who are unable to procure for themselves the needs of suffering humanity, is an essential part of municipal government, the right to determine the means, form and manner of extending the relief according to the exigencies of each particular case, must exist also. In this case, two policemen, who had been severely wounded in the discharge of their duties by gun shots, and who were poor and destitute, had applied to the City Council for assistance. If the council had power to provide for them at all, it surely had the power to provide the assistance most needed—that of the services of a skillful surgeon. *Samuel Logan* v. *City of New Orleans*, 101.

2. The title to the act No. 7 of the extra session of 1870, is sufficiently expressive of its objects and purposes to indicate the intention of establishing a new city charter, and, as a consequence, the prescribing of the city limits or boundaries.

CORPORATIONS—Continued.

Cities may properly be extended in their boundaries as need or convenience may require. The extension of their boundaries may, as in the present case, include rural districts, the condition of which is very materially different from the character of city property.

Taxation must be equal and uniform, but the ascertainment of the proper standard of valuation to form the basis of taxation is well nigh insurmountable. It is at least a difficulty that is never clearly and satisfactorily removed.

The principle is well settled and the doctrine established, that a Legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike.

The tax in dispute in this case has been imposed since the city charter of 1870, which makes it the duty of the City Council to lay an equal and uniform tax upon all real and personal property in said city.

From these well settled principles and the law applicable to this case, it must be concluded that the objections urged against the constitutionality and legality of the tax in question are untenable.

City of New Orleans v. *Pierre Cazelar*, 156.

3. The municipal corporations of this State are permitted to subscribe for stock of railway companies on certain conditions. In this instance, no ordinance whatever, in compliance with these conditions, was passed by the City Council of Shreveport, but, on motion, the proposition of a certain railroad company, to have a vote of the people taken for a subscription to the stock of the company to the amount of three hundred thousand dollars, was referred to the Mayor with authority to order an election. This could not be done. Therefore the acts of the Mayor in the matter were unauthorized and illegal, and could not impose any duty or obligation on the officers of the municipal corporation.

State of Louisiana ex rel. W. S. Haven, President, etc. v. *The City of Shreveport*, 623.

4. The contract for macadamizing Commerce street in the city of Shreveport was awarded to the undertaker on the third of May, 1871, and the assessment to pay for the work was ordered on the eighth of that month. These acts were done under the authority conferred by the act of the Legislature of March 9, 1869.

But the law establishing the new charter of the city of Shreveport was approved by the Governor on the twenty-seventh of April, 1871, and went into effect from and after its passage. The council deriving its powers from the act of 1869, in virtue of the constitutional provision on that subject recognized by the 21st section of

CORPORATIONS—Continued.

the new charter, held over and remained in office until the organization of the new council to be appointed under the new charter; but it was, from and after the passage of the act of twenty-seventh April, shorn of the powers it previously possessed under the law of 1869. From and after the passage of the act of twenty-seventh April, 1871, it could only exercise the powers granted under that act, and these did not authorize the contract and assessment made in May, 1871.

City of Shreveport v. *Mary M. Maples—City of Shreveport* v. *F. P. Stubbs—Consolidated*, 636.

SEE PRIVILEGE, No. 4—*Crescent City Gaslight Company* v. *New Orleans Gaslight Company*, 138; AND NOS. 9 AND 10—*Sam Smith & Co.* v. *City of New Orleans et al.*, 286.

SEE ACTION, No. 10—*John Wolf* v. *City of New Orleans*, 309

SEE LIBEL, No. 3—*Benito Vinas* v. *Merchants' Mutual Insurance Company of New Orleans*, 367.

SEE FIREMEN'S CHARITABLE ASSOCIATION, No. 1—*Teutonia Insurance Company* v. *Thomas O'Connor et als.*, 371.

SEE TAXES AND TAX COLLECTORS, No. 11—*H. Galley* v. *L. Guichard*, 396.

SEE SALES, No. 15—*Edwards* v. *Fairbanks & Gilman*, 449.

SEE MORTGAGE, No. 11—*Consolidated Association of the Planters of Louisiana* v. *Mason et als.*, 535.

SEE CONSTITUTION No. 8—*Mayor and Selectmen of the Town of Homer* v. *John B. Blackburn*, 544.

CRIMINAL LAW.

1. Before the jury was impanneled, defendant objected through his counsel to the impanneling of the jury because he had not been served with a copy of the indictment and a list of jurors who were to pass upon his case, two entire days before his trial. The court *a qua* erred in overruling the objection and proceeding to trial. *State of Louisiana* v. *Joe Guidry*, 206.

2. There can no judgment be passed, when there was no arraignment. The arraignment is the issue made, and when there is no issue, there can be no trial. This absolute requirement of the law is not cured by the fact that the accused was brought into court and tried without objection.

State of Louisiana v. *Chapman Epps*, 227.

3. In this case no sentence having been pronounced, and no fine imposed in the court *a qua*, the plea to the jurisdiction of this court, founded on article 74 of the constitution, must prevail.

The State of Louisiana v. *Matilda Brown, Martha Brown and Chapman Epps*, 236.

CRIMINAL LAW—Continued.

4. The coroner's inquest being signed by the coroner and duly certified by him, the jurors having signed by making their cross marks, and the whole being certified by the coroner, who is a sworn officer, his certificate of the signatures of the jurors is sufficient.

State of Louisiana v. *William Evans*, 297.

5. Act 124 of the acts of 1874, organizing the Superior Criminal Court, gave that court exclusive jurisdiction of this case, and no order of transfer or other decree was necessary to give it jurisdiction.

If a *nolle prosequi* was entered on the first count for "forgery," the forged order was copied in the second count "for publishing as true a forged order for the delivery of goods," and no explanatory averment of the meaning of the words and figures thereof was necessary—the meaning being obvious. The signature of the forged order "Randal & Co., 43 Carondelet street," was sufficient to suggest the name of a firm upon whom the forgery was committed.

It was not necessary to allege that Randal & Co. had goods at the place designated in the forged order.

The averments of the second count were ample to apprise the defendant of the charge against him, and to put him in possession of all information necessary to prepare his defense.

That a new trial and *nolle prosequi* were entered on the first count charging forgery, is no reason why the defendant should escape the verdict and sentence on the second count for a distinct and separate offense.

The new trial and *nolle prosequi*, as to the first count, were entered on the twenty-third of May, 1874; the motion in arrest of judgment, however, was not presented until the twenty-seventh, four days afterward. This court is not prepared to say that the judge *a quo* erred in holding that the motion came too late.

The expression in the decree of the court that "the prisoner having been brought into court, and having nothing to say in arrest of judgment, was sentenced," etc., of course, implies that he was asked if he had anything to say why sentence should not be pronounced against him.

State of Louisiana v. *George Fritz, alias George Frey*, 360.

6. In reply to questions propounded by the judge to the juror, he said that the opinion he had referred to on his *voire dire* as having been formed at the time of the occurrence was not an opinion, but an impression which would readily and easily yield to evidence (strong evidence), and that he could go into the jury box and render a verdict according to the evidence in the case, regardless of the impression referred to by him. The objection by the

CRIMINAL LAW—Continued.

defendant to this juror was not well founded; the juror was not disqualified.

There was nothing defective in the manner of sentencing the accused. The record shows that, having been brought into court, "and having nothing to offer in arrest of judgment," he was sentenced. This sufficiently shows that he was asked if he had anything to say why sentence should not be pronounced against him.

It was not necessary that the defendant should be present when the motion for a new trial was made and overruled.

State of Louisiana v. *Joseph Hugel*, 375.

7. The record shows the accused was present during the trial, that he was arraigned and pleaded not guilty. Nothing more was necessary.

The transcript, which is very badly made up, does not show that the accused was asked if he had anything to say why judgment should not be pronounced against him. It is not considered that this ceremony is necessary, though usual and perhaps prudent, in cases not capital.

The regular *venire* drawn for the term was set aside on the objections urged by defendant, that it had been drawn under the act of 1873 instead of that of 1868, and the special *venire* shows that it was drawn under an order of the judge commanding the same. The defendant's objection to the drawing of the jury can not be maintained.

The refusal of the judge *a quo* to permit the accused to contradict the official acts of the clerk by his parol evidence was proper.

State v. *Ned Taylor*, 393.

8. It sometimes happens that the prosecution, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against both jointly. In such case, according to legal authority, if no evidence whatever be given to affect a person thus unjustly made a defendant, the judge in his discretion may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony.

From this authority, as laid down, the inference would seem to be that, when the judge considers the evidence of sufficient weight to question the innocence of the parties sought to be made witnesses for the principal defendant, he should not order their acquittal. The ruling of the judge *a quo* in this case is in conformity with this doctrine, and must therefore be maintained.

State v. *Gustave et als.*, 395.

9. The judge *a quo* was asked to charge the jury that "if the jury believed that the defendant Hamilton was handcuffed at the time

CRIMINAL LAW—Continued.

he was presented to the deceased for recognition, then such recognition was not made in conformity to law and must be rejected."

The judge did not err in refusing the charge. The fact that the defendant may have been handcuffed could have no effect upon the ability of the party wounded to recognize him.

The State of Louisiana v. *Henry Hamilton*, 400.

10. The prisoner was charged with having forcibly entered a certain house in the night time, armed with a dangerous weapon, with the intent to kill. He was found guilty of everything he was charged with, except that he was not armed with a dangerous weapon. The verdict is therefore responsive to the indictment, and a valid sentence could be rendered thereon. The two sections of the Revised Statutes, 850 and 851, form but one law.

The State of Louisiana v. *Jacob Morris*, 480.

11. Alcee Harris and Toney Nellum were indicted for murder. No severance was asked by either of the defendants. On the trial evidence of confession by Nellum was offered against him, not objected to, and received. The position taken by Alcee Harris that it involves her in the crime, that it was hearsay, and therefore not admissible, can not be maintained. The evidence was only offered against Nellum and admitted as to him. It was not, under the instructions of the judge, used against Alice Harris. Hence she can not complain. It must be presumed that the jury followed the instructions of the judge.

Both defendants moved for a new trial, which was refused. As no question of law is presented in either of these motions, this court can not consider the legality of the judge's rulings upon them.

The word *willful* is not sacramental, and its omission in the indictment does not vitiate that instrument. Defendants are charged with having feloniously murdered the deceased. The felonious murdering was necessarily a willful act. Whether it was willful and felonious were questions of fact which it was the province of the jury to decide.

The State of Louisiana v. *Alcee Harris and Toney Nellum*, 572.

12. There is no law of this State, nor any authority under our jurisprudence, requiring a more definite description in an indictment for stealing money than the word itself imports.

The State of Louisiana v. *Charles Green, alias Henry Green*, 598.

13. Where a witness declared that he had formed an impression based on newspaper statements and that said impression would give way to evidence, that is no cause for challenge.

The judge *a quo* properly rejected the following question to a witness: "You have stated that the accused received in his youth sev-

CRIMINAL LAW—Continued.

eral injuries upon the head; you have stated also that his language and conduct were at times strange and extraordinary. Was that conduct and language that of a rational man?" The facts in regard to the language and conduct should have been detailed.

The following charge to the jury, which was objected to, is undoubtedly correct:

"The killing once proved, the burden of extenuation and of showing all circumstances of accident, misfortune, or justification are thrown upon the defendant. When insanity is pleaded in defense of a criminal act, it must be clearly shown that it existed at the time of the commission of the act. Every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defense to prove it by evidence which will satisfy the minds of the jurors that the party was insane at the time of the commission of the offense. Drunkenness is no excuse for crime, and any state of mind resulting from drunkenness, unless it be a permanent and continuous result, still leaves the person responsible for his acts."

The judge *a quo* did not err when refusing to charge the jury as follows:

"If the defense to an indictment is insanity, the burden of proof is on the government to satisfy the jury beyond a reasonable doubt that the prisoner was sane when he committed the act, and if the jury entertain any doubts of his sanity, they must acquit him of guilt." The burden of proof is upon the party setting up the defense.

The judge *a quo* did not err when refusing to charge: "That, where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors."

The court below did not erroneously refuse, as alleged, to instruct the jury, "That, if some controlling disease was in truth the acting power within the prisoner, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible." The instruction was calculated to mislead the jury.

There is no error, as assigned, because the record fails to disclose "the names of the grand jurors by whom the indictment was found, the time and place at which the jury was formed, and whether the indictment was formed by twelve or more." In the record is found the following copy of the minutes of the court:

"The grand jurors duly empanneled and sworn in and for the body of the parish of Orleans appeared this day into court, and being called, retired to consider upon the business laid before them; they afterward returned into court and presented the following bill of indictment." This is sufficient.

CRIMINAL LAW—Continued.

There is no error, as assigned, because "the record fails to show that the defendant was asked if he had anything to say why sentence of the law should not be pronounced on him." The remark in the decree, "and having nothing to offer in arrest of judgment," of course implies that the defendant was asked if he had anything to say why sentence of the law should not be pronounced on him.

It is unimportant and no error that the record fails to show "that the prisoner was present in court when the motion for a new trial was made and refused."

The objection that the court allowed the Attorney General, after announcing that the evidence in behalf of the State was closed, to offer another witness, is without weight. It was within the discretion of the judge.

State of Louisiana v. *Edward Coleman*, 691.

DAMAGES.

1. It is true that the *allegata* and the *probata* must agree, but it is sufficient if the substance of the issue be proved. The real substance in this case is not where the plaintiff was, to a mathematical precision, when he was injured; but first, whether he did suffer, and secondly, whether, if he suffered, it was from the fault of the defendant.

But where the conduct of the plaintiff has been negligent and has contributed to the injury received, he can not recover, even though the defendant be in fault, and such is the fact in this instance. The damage done to plaintiff was in part the result of his own carelessness. He can not therefore make the railroad company responsible for a disaster which he brought to some extent upon himself.

Johnson v. *Canal and Claiborne Railroad Company*, 53.

2. A motion to dismiss an appeal on the ground that it is frivolous can not prevail, although it may be a good one for giving damages when the case shall be tried on its merits.

A party may obtain judgment on motion after ten days notice.

Henry Reiners v. *Valentine St. Ceran—S. D. Maxwell, Surety on Appeal Bond*, 112.

3. The purpose of the laws is clearly, that the work of constructing, repairing and strengthening the levees shall be done under plans, surveys, measurements and directions to be furnished by a board or commission of engineers, for the appointment of which the law provides, and the Louisiana Levee Company will not be held responsible in damages to individuals except in certain cases and according to the provisions recited in section 5 of act No. 4, of the acts of 1871, page 33.

N. Louque v. *Louisiana Levee Company*, 134.

DAMAGES—Continued.

4. The city is not responsible for the damages which may result to one of its officers when in the discharge of his duty. It is a risk which he runs when he accepts the position.

Spalding v. *City of Jefferson, and Purdon* v. *The City of New Orleans et als.—Consolidated*, 159.

5. In this case the act of the officers of the city and the men in their employ being a trespass upon plaintiff's property, for this the law holds the corporation liable. A judgment in favor of the city of New Orleans, like other judgments, could only be executed by the proper officers of the law. It was the province of the court to see that its orders were obeyed. It was no part of the mayor's duty to enforce its decree.

The Pontchartrain Railroad Company v. *The City of New Orleans*, 162.

6. This is a claim for damages for the illegal attachment of the plaintiffs' vessel in the suit of Sibley, Guion & Co. *v.* Fernie Brothers & Co. There was no just ground for seizing this vessel as the property of Fernie Brothers & Co., but there is some difficulty in fixing the damages to which plaintiffs are entitled. The true standard seems to be the expenses incurred and profits lost as the direct consequence of the seizure and detention and as far as they are ascertainable on the part of the plaintiffs.

The British and American Steamship Navigation Company, Limited, et al. v. *Sibley, Guion & Co. et al.*, 191.

7. In an action of libel proof of damages from the publication is not necessary to recover. The actual pecuniary damages in such actions can rarely be proved, and is never the sole rule of assessment. *James M. Cass* v. *New Orleans Times*, 214.

8. There can be no damages awarded for an illegal arrest, unless the same was maliciously procured.

Charles Joseph Gourgues v. *Charles T. Howard et als.*, 339.

9. The act by which the plaintiff suffered was not done by any one for whom the defendant is responsible, under his direction, or in the usual course of his employment. He can not therefore recover. *B. St. Mesme LeBreton* v. *P. J. Kennedy*, 432.

10. The plaintiff claims damages from the defendants on the ground that they have located their railroad so near his dwelling as virtually to destroy its usefulness to him for the purpose for which it was built.

It is a valid defense that defendants were authorized by the Legislature and the City Council to place their track where they did.

Dominick Koelmel v. *New Orleans, Mobile and Chattanooga Railroad Company*, 442.

DAMAGES—Continued.

11. This suit is instituted by the husband of the deceased and the father of her child, a minor, against the defendant, a druggist, to make him responsible in damages for the death of this woman, the allegation being that the prescription was improperly compounded. The damages are claimed in his name and that of his child. His damages, if he is entitled to any, is the amount expended by him for medical and other services subsequent to the giving of the noxious enema and for the funeral expenses. The right to damages on the part of the child is that which he inherits from his mother.

The defendant's exception to plaintiff's demand, on the ground that the petition disclosed no cause of action, was a peremptory one and could be pleaded at any time during the progress of the trial. The grounds on which the exception rested were, that it was not alleged that the damage complained of was suffered through the *fault* of the defendant, and such allegation is necessary before that *fault* could be proved; and also, because plaintiff did not state that defendant, as employer, might have prevented the act which caused the damage, and did not do it.

Defendant excepted to the order allowing plaintiff to amend on the aforesaid points. The exception can not be maintained. Amendments are always allowed in the discretion of the court.

The demand is the test to interrupt prescription, and not the sufficiency of the allegations which support it.

If the allegations were sufficient to imply fault on the part of defendant, the use of the very *word* itself was not necessary to fix the responsibility on defendant. If he could have prevented the act, as is alleged, and did not, he was necessarily in fault.

The clause in which plaintiff, as tutor of the minor, claimed ten thousand dollars damages suffered by said minor personally, in the loss and deprivation of the care, education, assistance and love of his mother was, on motion, properly struck out by the judge *a quo*.

The action, so far as the minor is concerned, is the right of action which his mother had against the defendant for the suffering that was caused her by the defendant's employe, and which he inherited. He has no claim against him for the loss which he suffered through his mother's death.

The judge *a quo* erred in striking out the clause in which plaintiff, in his individual capacity and on his own behalf, claims damages for actual expenses, loss of the assistance and services of his wife in business, and for personal sufferings in mind for the loss of his wife, caused by said criminal mistake. Defendant is responsible

DAMAGES—Continued.

for all the expense and damage which plaintiff suffered subsequent to the giving of the enema.

Defendant's objection on the ground that the certificate of death given by the physician states that the woman died of yellow fever, and that the plaintiff caused it to be published in the newspapers, is not well founded. In so far as the certificate is concerned, that was no act of the plaintiff's. As regards the notice, she might have died of the yellow fever, and still her death from that disease might have been caused by the enema. Although very ill, the deceased had at least one chance for her life, which was taken away by the fatal ministering of a violent substance.

Although absent from the city, the defendant was nevertheless responsible for the act of his servant. Admitting the competency of the servant, the responsibility of the employer would be none the less. *William McCubbin, Tutor,* v. *Samuel Hastings,* 713.

See Constitution, No. 1—*Decuir* v. *Benson,* 1.

See Jury, No. 1—*Sauvinet* v. *Walker,* 14.

DATION EN PAIEMENT.

1. On the thirty-first of January, 1872, John Eaton made to his wife a *dation en paiement.* On the sixth of February, 1872, the plaintiffs obtained a judgment against Eaton on a debt which was contracted before the *dation en paiement.* The donation by him to his wife of certain checks, mentioned in his contract of marriage, was perfected by the marriage. The money collected by the husband from the banks on said checks, as well as the price of a slave mentioned in said contract of marriage as belonging to the wife, was her property, for which she had a mortgage on her husband's property to secure its restitution. Before any other mortgage in favor of the plaintiffs had attached to said property, he gave it to his wife in payment of the said sum due to her. This giving in payment was lawful.

The property thus given to the wife by the future husband was extra dotal, because the title of the wife was not indefeasible until the marriage was consummated.

Article 2335 C. C. declares that the separate property of the wife is divided into dotal and extra dotal. In this case it is immaterial whether the checks aforesaid were dotal or extra dotal. In either case the wife had a mortgage on the property transferred to her, and the creditor was not injured, as it is admitted that the price for which the property was transferred to the wife is a fair and full price.

Had the husband been insolvent when the *dation en paiement* was made, that fact would not have prevented the giving in payment,

DATION EN PAIEMENT—Continued.

to replace the wife's paraphernal property alienated during marriage.

There is no force in the objection that the wife assumed the payment of a mortgage which the Citizens' Bank had on the property transferred to her. She took the property *cum onere* in payment of her claims. The plaintiffs, at least, have no interest in raising this objection.

E. Newman & Co. v. *John Eaton and wife*, 341.

2. It is of the very essence of the *dation en paiement* that delivery should actually be made.

Neither a sale nor a *dation en paiement* can avail against an attaching creditor when there has been no delivery.

In this instance the intervenors were fully aware of the indebtedness of the defendant to the plaintiff at the time the defendant became indebted to them, and of his failing and insolvent condition at that time; and under this state of facts they may well be considered as having aided the defendant in his fraudulent designs to defraud the plaintiff's claim, first by taking a mortgage from defendant on his property, and subsequently by transfers of that property only a few days before the plaintiff's attachment was levied on the same property.

J. P. Shultz v. *Joseph Morgan. John Chaffe & Brothers, Intervenors*, 616.

DOMICILE.

1. The defendant objected to the jurisdiction of the court below on the ground that he was, as alleged in the petition, a citizen of the State of New York. A citizen of that State can be sued in the courts of this State. He may cause the case to be removed to the United States courts by following the statutes upon this subject. But if sued, cited and served with copy of the petition, he can not plead his domicile, for the reason that, in so far as this State is concerned, he has no domicile.

Perkins & Billiu v. *Charles Morgan*, 229.

DRAINAGE.

1. The opponents to the homologation of the assessment roll presented by the commissioners of the First Draining District, err in basing their opposition on the ground that some of the lands upon which the assessment in controversy is established were drained at their cost under the provisions of Act No. 49 of 1839, and are by the thirteenth section thereof specially and forever exempted from any further assessment for draining. This section created no contract between the State and the opponents, by which their lands were exempted from the assessment under consideration.

DRAINAGE—Continued.

This assessment is not an *extra tax* within the contemplation of said thirteenth section, which made it the duty of the municipality of New Orleans to maintain the works erected by the draining company on the particular section drained, without ever levying an extra tax on the lands so drained, but only out of the funds arising from the general tax imposed throughout the municipality.

The act of 1861, No. 57, provided, as its title indicates, for the collection of the assessment for draining under the act of 1858 and the supplementary act of 1859, and it seems that the present proceedings were instituted in accordance with the provisions of the act of 1861.

The Legislature of 1871, in act 30, has legalized the assessments made by the three boards of commissioners under the said acts of 1858 and 1859, and other supplementary and amendatory acts, and authorized and directed the board of administrators of New Orleans to collect the balance due on said assessments, which the said administrators are now seeking to do.

The State, in ordering the draining, is exercising sovereign power, and can of course direct or authorize the work to be done in such way, and compensation made in such terms, as its discretion may deem best, restrained only by the fundamental principles upon which the government is to be conducted; and nothing is found in those principles inhibiting the State from having the means provided for such a work in the way it is done in the present system of drainage in New Orleans. The existing laws clearly authorize the collection sought to be enforced, and no reason can be seen for judicial interference with the discretion of the State.

In the matter of the Commissioners of the First Draining District, praying for the homologation of the assessment roll, etc., 20.

2. According to the provisions of the several statutes of the Legislature creating and regulating the duties of the drainage commissioners for the city of New Orleans, to whose rights and duties the respondents have succeeded, it is the ministerial duty of the respondents to collect the assessments and judgments for drainage taxes, in time to meet the payment of the warrants to be issued to the Mississippi and Mexican Gulf Ship Canal Company by the Administrator of Accounts for work done by said company, and a mandamus will lie to compel the performance of this duty.

As to the objection that the relator could not acquire, and the Mississippi and Mexican Gulf Ship Canal Company could not assign their franchises to him, it is one which the respondents are without interest to raise. The transfer, whether in pledge or in full property made to him by said company, has been recognized by the

DRAINAGE—Continued.

Legislature in act 22 of the acts of 1874, proposing an amendment to the constitution limiting the debt of the city of New Orleans, and it is now a part of the organic law of the State. After such a transfer, thus recognized by the State, the respondents can certainly raise no objection to said transfer.

State of Louisiana ex rel. Warner Van Norden v. *The Mayor and Administrators of the City of New Orleans*, 497.

3. If the proprietor below erects a dam or any other thing which obstructs the natural drainage of the estate above, he can be compelled to remove the obstruction and to pay damages sustained on account thereof. *Bowman et als.* v. *The City of New Orleans*, 501.

4. Act No. 30 of the acts of 1871, entitled "An act for the drainage of New Orleans," does not repeal the act of 1858, which provides for leveeing, draining and reclaiming swamps in certain portions of the parishes of Orleans and Jefferson. It only changes, in some degree, the mode by which the drainage is to be accomplished and the means to be applied, but the act itself still stands.

The main reliance of the plaintiffs is, that the lands belonging to them have not been and will not be benefited by the drainage works which are now in progress. But this allegation is not supported by the testimony of the witnesses.

The New Orleans Canal and Banking Company v. *City of New Orleans*, 505.

ELECTIONS.

1. On the trial in the court *a qua* the defendants severally claimed in vain the right to challenge ten jurors under the act of 1855. If it was ever contemplated that several plaintiffs claiming different offices could unite to bring one suit against several defendants, it is manifest from the unambiguous language of the law in regard to contested elections that each defendant would have the right which was claimed and which was refused.

Taking as true what the defendants admitted, to avoid a continuance: "That the election returns of the parish were not made out and sworn to as the law requires, and that the ballots for ward one will not show the same result as to the returns, this would not be sufficient to defeat the parish election. It has often been decided that the failure to comply with the directory clauses of an election law will not annul an election. Courts can not affix to the omission a consequence which the Legislature has not affixed.

There is an essential difference between the act of voting and the police provisions to secure the evidence of the act. If the votes be deposited, the object of the election is attained, and its validity

ELECTIONS—Continued.

can not be affected by the non-observance of the directory provisions.

If the sworn statements be true, that the ballots and returns in the ballot boxes which were called for and could not be procured have been tampered with so as to render them unreliable as evidence, the result of the election, as ascertained and announced by the commissioners of election at each precinct, might have been proved by the next best evidence in existence.

The irregularities shown by the evidence to have existed, resulted from a want of information on the part of the officers of the election, and said irregularities do not in any manner affect the result of the election in the parish.

The fact that the ballot-box, at one precinct, could not be seen by those voters who stood near the window can not be a cause to annul the election.

The law does not authorize an election to be set aside, except for fraud, intimidation, violence or corruption, at or before the election, and then only when such fraud, violence, intimidation, etc., had the effect to change the result of the election.

It is not shown that the defendants had any connection with the irregularities committed, or with any acts of fraud, or violence, if any were perpetrated.

Nicholas Burton et als. v. *Charles Hicks et als.*, 507.

ESTOPPEL.

1. The plea that the plaintiff is estopped from contesting the validity of the sale because he appointed an appraiser of the property sold is valid. He can not be permitted to avoid the responsibility of that act by stating that he did it under protest.

Walker v. *Sauvinet, Sheriff, et als.*, 314.

2. Plaintiff can not now be heard to contradict the allegations of his petition in regard to the ownership of the property in litigation, which he made in another controversy, nor can a witness be heard now to contradict the testimony which he then gave.

J. O. Howell v. *Sheriff of East Feliciana et als.*, 701.

EVIDENCE.

1. The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

William L. McMillen v. *Robert K. Anderson*, 18.

2. The rules and regulations of the United States Board of Supervisors do not specify and particularize the short bends and points

EVIDENCE—Continued.

at which certain precautionary signals are to be made by steamers. In the absence of such specification by the board, it would seem then to become a matter within the judgment and discrimination of the navigators of the rivers, to determine the places where, by the rules and regulations governing pilots, signals are to be given.

A transcript of the proceedings before the United States inspectors, in relation to the sinking of the steamboat Texarkana, which gave rise to this suit, embracing the evidence taken on that occasion, was offered on the part of defendants to prove *rem ipsam*. This was objected to by the plaintiff as *res inter alios* and irrelevant. The court *a qua* sustained the objection to that extent, but admitted it for the purpose only of contradicting the statements of witnesses. The court did not err. The action taken by the board of inspectors could not bind the plaintiff who was not a party to it.

Kennett & Bell v. *Union Insurance Company of New Orleans*, 26.

3. Parol evidence was clearly inadmissible to prove that the wife of the defendant was the debtor in a contract executed by him, and that he signed it as her agent, and not in his individual capacity as it appears in the contract itself, no error or mistake in executing the instrument being alleged in the answer.

This testimony being excluded, there is no reason why the defendant, who was not one of the heirs of his wife's father, should not pay the debt he contracted with the administrator of the succession, whether there are, or not, sufficient funds in his hands to pay the debts of the deceased.

If the plaintiff had consented, when the instrument was given, in consideration of the purchase by the defendant of succession property, that said defendant should not be required to pay the debt until there was a partition of the estate among the heirs, it would not have been obligatory, because an administrator can make no contract in a matter of that kind binding on the succession, he having no right to fix the terms of selling succession property.

O. W. Fluker, Administrator, v. *Amos Kent*, 37.

4. It is true that the *allegata* and the *probata* must agree, but it is sufficient if the substance of the issue be proved. The real substance in this case is not where the plaintiff was, to a mathematical precision, when he was injured; but first, whether he did suffer, and secondly, whether, if he suffered, it was from the fault of the defendant.

But where the conduct of the plaintiff has been negligent and has contributed to the injury received, he can not recover, even though the defendant be in fault, and such is the fact in this instance. The damage done to plaintiff was in part the result of his own

EVIDENCE—Continued.

carelessness. He can not, therefore, make the railroad company responsible for a disaster which he brought to some extent upon himself.

Wm. H. Johnson v. *Canal and Claiborne Railroad Company*, 53.

5. Where the defendant, being sued for the payment of a certain sum in consequence of the construction of banquettes in front of his property in Locust street, averred that the city of New Orleans had not complied with the formalities set forth in the city charter in this—that one-fourth of the owners of real property fronting on said unbanquetted street did not petition for the banquetting alleged to have been done in that locality;

Held—That a petition signed by a number of persons representing themselves as property holders on Locust street, asking for banquettes to be constructed in that street, being found in the record, it must be supposed, in the absence of rebutting evidence, on the principle of *omnia presumuntur rite esse acta*, that the persons petitioning constitute one-fourth of the property owners on that street. *James J. O'Hara* v. *Henry Blood*, 57.

6. Before the party insured can recover on his policy, the express condition to prevent the forfeiture of the policy—which is—that the insured shall have the notice of other insurances taken upon the same property indorsed upon the instrument, or otherwise acknowledged by the insurers in writing, must be shown to have been complied with.

The propriety of such a clause in a policy of insurance is particularly apparent in this case on account of the discrepancy of testimony. Its purpose is to enable the insurance company to protect itself, and to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on property insured by them. The rule which excludes parol evidence in such cases is well settled and strictly adhered to.

Meyers and Winchill v. *The Germania Insurance Company—Cochran & Co. et als., subrogated*, 63.

7. Where the objection to the introduction of an original act of sale as evidence was: First—Because it was not an authentic act, having but one witness; second—because there was no proof of signatures; and third—because the plaintiff, having declared on an authentic act, a private writing is inadmissible;

Held—That the judge *a quo* did not err in admitting the evidence; because it is sufficiently proved that the instrument was signed by the parties, and is not so inconsistent with the one declared on as to make it inadmissible. It was signed by a notary public, and failed in being authentic only for want of the signature of one of

EVIDENCE—Continued.

the two witnesses named in the act which was and has since been in the records of said notary. Besides, it is proved that the price of the sale was received and that the mortgage retained by the vendor was duly canceled. This shows that the title passed from the vendor to the vendee.

Miss Henrietta Morfit v. *Joseph Fuentes—Heirs of Farish, Called in Warranty*, 107.

8. Where the terms of the contract for building were, that "no extra was to be admitted or allowed for, unless executed under written authority, and all omissions, additions or alterations should be estimated for, and the value thereof agreed upon by the superintendent, and added to or deducted from the contract sum, as the case may be, by an endorsement, or no allowance for the same shall be made by the other party;"

Held—That certain items of extra work claimed by the plaintiff, could not be proved by parol evidence under the contract, and second, because they were outside of the contract, in no manner connected with the specifications in the contract, and contrary to the allegations in the petition. *John Page* v. *Nicholson & Co.*, 116.

9. Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed;

Held—That the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or that of the court if the husband refused the assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs, could set up proceedings to annul.

Dennis Cronan v. *Edward Cochran et als.*, 120.

10. A bill of exceptions being taken to the admission in evidence of a notarial act, on the ground that the plaintiff had not alleged in his pleadings the assumpsit of the debts of an old firm by a new one, which it was the object of the evidence to establish;

Held—That the evidence was properly admitted. The defendants, by pleading a general denial, put at issue the question of their liability to pay the note sued upon, and the plaintiff had the right, by proper evidence, to show that they were liable.

By the commercial law every member of a commercial firm can bind the others by drawing or indorsing commercial paper. If by an agreement *inter se*, a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement.

Henry T. Cottam v. *George H. Smith & Co.*, 128.

EVIDENCE—Continued.

11. An inspection of the record in this case shows that there is no note of the evidence, and it appears that there was in fact no evidence introduced to sustain the various items in the executor's account, amounting to $678 50, grouped in said account, as "amount of privileged claims paid." Under article 1042 of the Code of Practice, the evidence in support of the claims should have been taken in writing and annexed to the record. The ends of justice require that this case should be remanded.

Succession of Celestine Dorville—in the Matter of the Executor's Account, 131.

12. Where parol evidence does not establish a debt against a dead person, but simply shows under what circumstances and for what purposes payments were made, it is admissible.

John Pemberton et al., Administrators, v. *Jules Maignan*, 134.

13. The note sued upon having been given subsequently to the date of a written contract and identified therewith in its own terms, it was proper to permit parol evidence to show the settlement or agreement under which it was given. The plaintiffs are not enforcing the written contract in all its parts, but suing on the note given in connection with said contract, yet for a sum different from that named in the contract. The note is evidence of a change in the sum first agreed on, and is binding on defendant in the absence of error or fraud.

The defendant being the agent of the intervenors and not their factor in the purview of the law invoked by them, and having had the possession and control of the machinery delivered to them, and having pledged it to plaintiffs, who are not shown to have known that it belonged to intervenors, the pledge must be sustained. The intervenors put it in the power of the defendant to make such use of the machinery, and they must bear the loss, if any. The principle which sustains the pledge as collateral, which is placed in the hands of a broker to sell, must apply here.

J. Davidson & Hill v. *Thomas B. Bodley, Norwalk Iron Works, Intervenors*, 149.

14. The difficulty in this case arises from the loss of a counter letter or private agreement existing between the plaintiffs and defendant, or rather from their disagreement in regard to the contents thereof. The bills of exceptions as to the parol proof of the contents of the counter letter or written agreement between the litigants herein were not well taken, a sufficient foundation having been laid to authorize the admission of secondary evidence.

An unreasonable contract is not to be supposed probable. It is not to be presumed that plaintiffs, who were merchants and business

EVIDENCE—Continued.

men, would have consented to advance large sums of money to cultivate a plantation for defendant's benefit, and themselves incur all the risks and losses attending the enterprise if not successful.

Payne & Harrison v. *Mrs. H. A. Stackhouse*, 185.

15. The testimony of J. H. Halsey, a brother of the plaintiff, was offered in evidence to show that a certain piece of land belonged to her at the time of her marriage to her present husband, one of the defendants in this case, and that she acquired it at a sheriff's sale. The testimony was objected to on the part of the defense on the ground that it was an attempt to establish by parol, title to real estate, which required written evidence. The bill of exception to the admission of such proof was well taken.

Mrs. Mary E. Halsey v. *P. S. Sandige and J. A. Payne*, 198.

16. Defamation by libel is the offense charged. Sections 804 and 1051 R. S. take this case out of the strict rules of the common law, and the purport only of the libelous letter as given in the information is sufficient. It was not essential that the information should have alleged that the letter was written in the German language in order to permit the State to introduce the letter and an authorized translation. The law of evidence upon this subject is complied with, if the matter or purport of the instrument offered conform to the purport and description thereof in the information. The law did not require the libelous letter to be set out in full, or a copy of it to be contained in the information.

State of Louisiana v. *H. H. Willers*, 246.

17. As the answer does not disavow the signature of the deceased, or as the heirs do not declare in the answer that they know not the signature, but, on the contrary, aver that it is an act under private signature void for simulation, or null as a disguised donation for informalities, the plaintiff was not bound to prove the signature further than she did by the testimony of one of the subscribing witnesses, and the preliminaary evidence on which the deed had been admitted to registry.

As the defendants have received from their ancestor, independently of the property in controversy, the full amount of their *legitime*, they can not attack for simulation the sale which he made to the plaintiff, and parol evidence in support of said charge was properly rejected.

As the ancestor of the defendants could, however, have shown the simulation of the sale by a counter letter or by interrogatories on facts and articles addressed to plaintiff, the defendants, his heirs, have the same right. Therefore, the interrogatories on facts and articles which plaintiff failed to answer were properly taken for

EVIDENCE—Continued.

confessed, and they establish the simulation of the sale beyond doubt.

Mrs. Corinne Tesson and Husband v. *A. L. Gusman et als.*, 266.

18. Beals & Laine are sued as makers and Edward Beals as indorser of a promissory note. E. Beals' son, a member of the firm of Beals & Laine, wrote the name of his father, who can not write, as indorser of said note. The evidence showing that Edward Beals subsequently ratified the act or adopted the indorsement, this is sufficient to bind him as indorser.

George Lysle and Son v. *Beals & Laine et al.*, 274.

19. What was never of record can not be supplied by parol. The ruling of a court upon the exclusion of evidence must be of record.

The plea of *res judicata* does not rest on the regularity of the proceedings which can be removed on appeal, but upon the force of the judgment pronounced on the demand and cause of action between the parties.

Mrs. Isabella A. Fluker v. *Mrs. Harriet Herbert. Mrs. Barkdull called in warranty*, 284.

20. The coroner's inquest being signed by the coroner and duly certified by him, the jurors having signed by making their cross marks, and the whole being certified by the coroner who is a sworn officer, his certificate of the signatures of the jurors is sufficient.

State of Louisiana v. *William Evans*, 297.

21. The ruling of the judge *a quo* permitting the husband of the defendant to testify in regard to the ownership of the property claimed by the third opponent, was correct. As between the third opponent and plaintiffs he was a competent witness, because the wife was not a contestant in that controversy.

The judge *a quo* did not err when refusing to allow a witness to state his opinions or conclusions as to the effect had in giving defendant credit by placing the mules in controversy on her plantation.

The objection by the seizing creditors that the third opposition was not made in time, as it was not served on them until after the sale, is not well founded under the circumstances of the case as exhibited by the evidence on record.

Schmidt & Zeigler v. *Mrs. Louise B. Williston et al. Alexander Thompson, third opponent*, 315.

22. In this instance there are two acts introduced which must be considered as parts of a whole and which were intended to be a full and final settlement of all the business relations of the parties. Plaintiff can not separate the different portions of this transaction, adhering to those parts which are favorable to her and repu-

EVIDENCE—Continued.

diate those which she considers unfavorable. She must, unless she had shown better reasons than she has, take all or leave all.

Josephine H. Ames v. *James Hale*, 349.

23. The parol evidence adduced by plaintiff to prove that the price paid by him was thirty-three hundred dollars instead of twenty-three hundred, as stated in the authentic act of sale, was properly excepted to by defendant. *Felix Formento* v. *F. J. Robert*, 489.

24. When defendant admitted the validity of the note sued upon and pleaded against it the extinguishment, novation and settlement stated in the answer, no proof was required of plaintiff to establish an indebtedness on the note, the law requiring no one to prove what is admitted in the answer.

The objection that the answer was not offered in evidence is frivolous. Pleadings make up the case, and are never offered in evidence on the trial thereof.

The judge *a quo* did not err in refusing to permit defendant to set up and prove an individual account against plaintiff in compensation or discharge of a debt due to him as tutor. The rights of the minors whom plaintiff represents in this action are in no manner affected by his individual indebtedness to defendant.

The entries made in plaintiff's books in the handwriting of J. P. Spears, the bookkeeper, against himself, or debiting himself, were admissible against the succession of the latter.

The declarations or statements of the witness Post to plaintiff, previous to the trial, were not admissible against plaintiff, because they were the declarations or statements of a third person, not a party in interest.

The claim of reversal of judgment because, as written, it is absolute, and not a judgment to be paid in due course of administration, is not well founded. This was evidently a clerical error in drawing the judgment, and is of no consequence, because the judgment must be construed in reference to the petition, wherein it is prayed that plaintiff's demand be paid in due course of administration.

J. B. Spears, Tutor, v. *Mrs. M. J. Spears, Administratrix*, 537.

25. This is an action of boundary. The judge *a quo* erred in receiving the report of the surveyors, which was not made in conformity to law. Revised Code, 834. *R. H. Lindsay* v. *W. A. Wright*, 565.

26. The parol testimony objected to was not inadmissible. The purpose of its introduction was not to contradict or vary the purport of a written instrument, but to establish an important allegation in the plaintiff's petition that, subsequent to entering into the written agreement, he had, at the special instance and request of defendants, supplied a considerable amount of labor and material

EVIDENCE—Continued.

appropriated to the erection of certain buildings in addition to that specified in the written act.

Daniel Buckmaster v. *E. & B. Jacobs*, 626.

27. The objection that the special commissioner named in the commission did not execute it, because he annexed to his signature "commissioner for the State of Louisiana," and did not affix the seal of his office, is frivolous. The person named as special commissioner executed the commission, and the addition of his title, if he be a commissioner for the State, did not vitiate his acts.

The judge *a quo* erred in refusing to receive evidence on the reconventional demand set up in the amended answer of defendant. That demand was sufficiently set forth. If the plaintiff had needed the particulars he mentions to enable him to make his defense against defendant's demand in reconvention, he should have required defendant to state with more accuracy his demand. As it is, the plaintiff appears to have been sufficiently notified of the demand against him for all practical purposes.

John Davis v. *William C. Madden*, 632.

28. This is a suit against an estate on an account made out against Joseph Howell, a deceased person. The plaintiff, by his own testimony and by that of another, offered to prove Howell's acknowledgment that he owed the debt and that he promised to pay it. This testimony was objected to by defendant, on the ground that such acknowledgment could only be established by written evidence. The judge *a quo* erred in receiving such testimony; neither was it competent for plaintiff to prove by parol the credits or payments alleged to have been made on the indebtedness.

The allegations that certain items of the account sued on were property belonging to plaintiff and sold by Howell, who retained the proceeds without accounting for them, were attempted to be sustained not by any written evidence, but by the parol evidence of the plaintiff and of an absent party who, by the admission of defendant's counsel, would swear, if present, that Howell acknowledged the correctness of the account. This testimony should have been excluded.

Where an account is not shown to be a stated account, and is to be regarded as an open one, it is prescribed by three years.

J. J. L. Goodman v. *J. J. Rayburn, Executor*, 639.

See Sales, No. 8—*Theriot* v. *Lyons, Sheriff, et al.*, 253.

See Partnership, No. 8—*Carrie A. Drake and Husband* v. *Hays et als.*, 256.

See Insurance, No. 3—*T. G. Egan* v. *The Firemen's Insurance Company and Pelican Insurance Company*, 368; and

EVIDENCE—Continued.

No. 4—*A. Roos & Co.* v. *Merchants' Mutual Insurance Company of New Orleans*, 409.

See Carriers, No. 3—*Laurent Julien* v. *Captain and Owners of Steamer Wade Hampton*, 377.

See Charter Party, No. 2—*Wilkinson and Frank Behan* v. *Joseph Dalferes et als.*, 379.

See Attorney at Law, No. 5—*Randolph, Singleton & Browne* v. *Carroll*, 467.

See Elections, No. 1—*Nicolas Burton et als.* v. *Charles Hicks et als.*, 507.

See Mortgage, No. 12—*Heard* v. *Patton*, 542.

See Succession, No. 8—*Succession of Haggerty*, 667.

EXECUTOR AND EXECUTRIX.

1. On the tenth of July, after a protracted contest, an order was rendered by the court, homologating the accounts of the executor so far as not opposed. On the fifteenth of September of the same year, Issac D. Brown, another of the heirs of the deceased, presented an opposition to the accounts. The executor properly objected to it on the ground that the judgment homologating the accounts formed *res judicata* as to his opponents.

Credits claimed by the executor for payment of sums of money to certain heirs, except one not opposed, were correctly rejected by the judge *a quo*. These sums received by the heirs will more properly be adjusted by collation in a final partition among them of the succession.

The court reserves to the executor the right to claim, in a final settlement and partition of the estate, all amounts he alleges to have paid to the heirs.

The judge *a quo* properly struck from the executor's accounts such items as do not come within that class of necessary articles indispensable in the cultivation of a plantation.

Succession of James N. Brown.—Homologation of accounts and opposition thereto, 328.

2. The sale from some of the heirs to a co-heir could not deprive the executor of his commissions. It was a charge due by the whole estate, and where the whole of the estate passed by contract to one of the co-heirs, the whole of the charges were due to the extent of the estate by the co-heirs who purchased. There was no want of consideration for the note given by the defendant for the amount of commissions. The succession having merged in her she owed the debt.

The plea of *res judicata* is not well taken. It seems to rest upon the judgment homologating the executor's account. It is con-

EXECUTOR AND EXECUTRIX—Continued.

clusive, it is true, as to the amount due, but it is no reason why the plaintiff should lose his judgment for said amount.

Thomas S. Wells v. *Annie Alexander and Husband*, 624.

3. John S. Mayfield, alleging that he is a creditor of the succession of Walter O. Winn, for reasons stated, prayed for the removal of the executrix from her trust. It appears from the testimony that in 1862 the executrix sold a portion of a certain plantation belonging to the succession by private sale. It also appears that she is not now a resident of the State, and that she has not given a power of attorney, duly recorded as required by law, to any one to represent her. These are sufficient grounds for destituting her of her trust.

Succession of Walter O. Winn. On petition of John S. Mayfield to destitute Mary E. Richards, executrix, 687.

SEE JURISDICTION, No. 12—*Succession of William Bobb*, 344.

FACTORS.

1. Factors and commission merchants, when exercising their functions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intendment of the thirty-third section of the bankrupt law of 1867, and are not released from obligations contracted in that capacity by a discharge in bankruptcy.

To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established that it must be shown that the owner or consignor knew of such custom and usage and assented to it.

J. W. Banning v. *R. Bleakley & Co.*, 257.

SEE PRIVILEGE, No. 5—*Gay & Co.* v. *Eaton & Barstow*, 166.

FALSE IMPRISONMENT.

1. There can be no damages awarded for an illegal arrest, unless the same was maliciously procured.

Charles Joseph Gourgues v. *Charles T. Howard et als.*, 339.

FIREMEN'S CHARITABLE ASSOCIATION.

1. While the Babcock extinguishers are used, without by such use interfering with or being in the way of the operations of the fire department, the plaintiffs or others may lawfully use them without incurring responsibility.

The resolution of the board of directors of the Firemen's Charitable Association, passed on the twenty-sixth of January, 1875, is more stringent and sweeping than it has the right to pass. Its purport is to abolish the use of the Babcock extinguisher within the limits

FIREMEN'S CHARITABLE ASSOCIATION—Continued.

of the city of New Orleans, under any and all circumstances whatever. The chief engineer is clothed with power and instructed to prevent the Babcock engines from running to fires, and the resolution provides, that the engineer shall "send them and the men working them to prison." This is an unwarrantable stretch of power.

Teutonia Insurance Company v. *Thomas O'Connor et als.*, 371.

FORFEITURE AND CONFISCATION.

1. Plaintiff was the owner of the property on which he made certain improvements, repairs, etc., for the reimbursement of the value of which he now sues. It is true that this ownership existed only during the lifetime of John Slidell, from whom it had been taken by forfeiture and confiscation. Still, during that time, it was absolute.

Besides, most of the improvements were made after the suit by the Slidell heirs was brought against him. This would deprive him of his right to recover the value of the improvements. If the suit between them was a question of title, as soon as the suit was instituted, he could no longer set up possession in good faith.

Joseph Brugere v. *The Heirs of John Slidell*, 70.

2. As Charles M. Conrad was an offender of a class mentioned in the act of Congress of the seventeenth of July, 1862, entitled an act to suppress insurrection, etc., this statute authorized the confiscation of his property, or the condemnation and sale thereof for the period of his life. By the decree of condemnation of the third of February, 1865, only such right or title as the said offender had, passed to and vested in the United States, and this was the title conveyed to plaintiff by the Marshal's sale on the twenty-ninth of March, 1865.

But Conrad, at that time, had no title to the property, having sold it to the defendants by notarial act in the parish of St. Mary, on the third of June, 1862, not only prior to the seizure, but anterior to the passage of the confiscation act itself, although the act was registered only in 1870 in the parish of Orleans, where the property is situated. Hence the United States acquired no title and could not convey any to plaintiff.

In regard to the property confiscated, the position of the United States was not that of a third party dealing with Conrad on the faith of the title standing in his name on the public records, or that of a bidder at a judicial sale, who is induced to buy the property standing on the public records in the name of the defendant in execution. *E. W. Burbank* v. *C. A. and L. L. Conrad*, 152.

The failure of defendants to record their title in the parish of Orleans,

FORFEITURE AND CONFISCATION—Continued.

as required by the registry laws of the State, subjected them to the risk of losing it, if seized by a creditor of their vendor, or if sold or hypothecated by him to an innocent third party. But the title of the property was nevertheless in them from the time of the sale, and neither their vendor nor his heirs could recover it from them.

As to the United States, it was immaterial whether defendants had recorded their title or not; the property in question belonged to them, and their title was not impaired by the proceedings under the act of July 17, 1862, instituted to confiscate the property of Charles M. Conrad for offenses committed by him. The defendants were not parties to these proceedings and their title to the property could not be divested by the decree of condemnation.

Ibid, 152.

3. The plaintiffs in this suit are not attacking the proceedings and judgment in confiscation pronounced by the United States Court. They recognize the validity thereof, but say that the effect of that judgment and the sale thereunder ceased at the death of their ancestor John Slidell, and that it was only his life estate that was disposed of. This is correct, and has been frequently reaffirmed by the Supreme Court of the United States.

Heirs of John Slidell v. *Germania National Bank*, 354.

4. The act of Congress, July 17, 1862, to suppress insurrection, etc., and the joint resolution of the same date explanatory of it, are to be construed together. Under the two, thus construed, all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offense it had been seized.

The fact that such person owned the estate in fee simple, and that the libel was against all the right, title, interest and estate of such person, and that the sale and Marshal's deed professed to convey as much, does not change the result.

On revising the decree of confiscation by the tribunal of last resort, the rights of the parties and the questions at issue at the time of the libel and decree were the subjects of inquiry. The rights which the plaintiffs now assert were not those at issue. They could not have intervened in the confiscation proceedings against John Slidell, to assert rights which only accrued to them long afterward, namely, on the death of their father, John Slidell.

The litigation on the writ of error and the revision by the Supreme Court of the United States only involved the validity of the confiscation. In this instance, the question is, are the plaintiffs entitled, under act of July 17, 1862, to the property in controversy,

FORFEITURE AND CONFISCATION—Continued.

since the death of their father, notwithstanding there was a valid confiscation of it under said statute? The question must be decided in the affirmative.

Heirs of John Slidell v. *J. Huppenbauer*, 383.

GARNISHMENT AND GARNISHEES.

1. The plaintiffs having judgment against the defendants *in solido*, issued execution thereon and made Terry, one of the defendants, a party garnishee, propounding to him certain interrogatories. This proceeding was excepted to; the judge *a quo* erred in overruling the exception. Terry, being one of the defendants in execution liable *in solido* with the others, was not a third person, and could not be proceeded against by garnishment process.

John T. Bailey & Co. v. *Lacey, Terry & Co.*, 39.

2. Judgment having been rendered against the defendants, as a firm, and the individual members thereof *in solido* for the amount of a note of the firm, there was another judgment in the same instance against Terry, one of the firm, for the same debt, on a rule against him as garnishee; this was an error; and an order making a rule upon him absolute to forthwith deposit in court sufficient cash or assets to satisfy the judgment against him as garnishee, was another error. Terry was not a third person in contemplation of the law applicable to garnishees; he was one of the defendants; judgment had been rendered against him individually and as a member of the firm. The second judgment, under a *fieri facias* against the "defendants," added nothing to his liability.

Charles L. Richardson v. *Lacey, Terry & Co.*, 62.

3. The plaintiffs contend that the garnishees having admitted that they owed Norris, the defendant, the sum of $2933, it is incumbent upon them to prove the correctness of every item of the sum they claim the right to retain, which plaintiffs aver the garnishees have failed to do. There is no evidence introduced by the plaintiffs to disprove the truth of the answers of the garnishees. The extent of the liability of garnishees is to be tested by their answers to interrogatories, when the truth of those interrogatories has not been disproved.

Flash & Co. v. *A. W. Norris—Reynolds, Dowling & Co. Garnishees*, 93.

4. When a firm is cited as garnishees, the answer to the interrogatories made in behalf of the firm needs not to be sworn to and signed by each member thereof. If the firm only is cited, the firm only is bound to answer, and any member thereof may make oath and sign the firm name. If the separate answer of each member be desired, citation must be addressed to and served on each member.

F. Dupierris v. *J. W. Hallisay.—E. Benjamin & Co. Garnishees*, 132.

GARNISHMENT AND GARNISHEES—Continued.

5. On the day fixed for hearing on the rule taken by plaintiffs on the garnishees in this suit to show cause why their answers should not be taken for confessed, an exception to the motion made by the garnishees for leave to amend and explain said answers was objected to by plaintiffs on the ground that it was too late, and overruled by the judge *a quo*.

There was no error in this ruling.

The garnishees evinced no disposition to refuse or neglect to answer, or prevaricate. Their original answers were not drawn as definitely as they might have been, but when read in reference to the manifest intent of the interrogatories which were addressed to them as bankers, gave a negative response to all the questions.

When a depositor's account with his banker is closed, the inference is clear and manifest that he has no fund in the hands of said banker.

Alfred Hennen, Mrs. A. M. Hennen, Executrix and Universal Legatee, subrogated, v. *Forget, Guillotet et al. Pike, Brothers & Co., Garnishees,* 381.

6. The garnishment process was not intended and can not be used to litigate and settle side issues. In this case were the attachment sustained, it would be the engrafting of the suit of J. J. McDaniel *v.* L. H. Gardner & Co. and A. Baldwin for damages, upon the suit of Peet, Yale & Bowling *v.* J. J. McDaniel & Co., and making Peet, Yale & Bowling the plaintiffs in the said suit for damages.

Peet, Yale & Bowling v. *J. J. McDaniel & Co., L. H. Gardner & Co. and A Baldwin, Garnishees,* 455.

7. A garnishee can not waive service of the proceedings required by law to make a seizure of effects or property in his hands. In this case, as the garnishee was not legally served, nothing was attached in his hands.

The judge *a quo* erred in allowing damages on the dissolution of the attachment in this instance. It is not pretended that the plaintiffs were not entitled to sue out the attachment against their debtor, a non-resident. There has been no abuse of that harsh remedy here, but merely a failure to get the benefit of the writ, because of the error committed in executing the process.

John Phelps & Co. v. *Horace Boughton,* 592.

GASLIGHT COMPANIES.

See Privilege, No. 4—*Crescent City Gaslight Company* v. *New Orleans Gaslight Company,* 138.

GOVERNOR.

1. This appeal was made returnable at the session of the Supreme Court to be held at New Orleans on the first Monday of November, 1874. Before the return day, to wit, on the twentieth of July, 1874, the relator procured the consent of the Governor for the transfer of the case to Monroe, and for its trial at the term held at that town. The Governor also employed an attorney for the defense, notwithstanding the opposition of the Attorney General and of Dubuclet, the defendant.

The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and the act 21 of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

State ex rel. Albert Baldwin v. *Dubuclet, State Treasurer—State of Louisiana, Intervenor*, 29.

SEE OFFICES AND OFFICERS, No. 9—*State ex rel. Leonard* v. *Jackson*, 541; and

No. 10—*State ex rel. Jacob A. Meyer* v. *Joshua Van Tromp*, 569.

HOMESTEAD.

1. The right granted to the widow or minor children of a deceased person by the homestead act, vests in them at the time of the death of the deceased, provided their condition of life at that moment entitles them to the benefit of the provisions of the act; their pecuniary circumstances at the time of the death of the insolvent, and not at any subsequent time, settles their right to any claim under the act. *Succession of S. Marx*, 99.

2. The property for which exemption from seizure is claimed by plaintiff, under the homestead law, seems under the circumstances of the case to partake more of the character of rural than urban property. The humane provisions of the homestead law reserving to the unfortunate debtor a home, and soil to cultivate, must be interpreted in the same spirit in which they were framed.

Christian Baden v. *J. B. Reeves, Executor, and Sheriff*, 226.

3. The obligations sued upon were entered into subsequent to the homestead law, and are therefore subject to it. These obligations novated a debt previously existing and secured by mortgage. Whether this original mortgage was valid or not for want of reinscription is immaterial. It was abandoned and became inoperative

HOMESTEAD—Continued.

by the consent of the original mortgagee, who received in lieu thereof the new obligations, which are now sought to be enforced.

Robert J. Moore v. *A. J. Beelman.—Same* v. *Mrs. Laura J. Beelman. (Consolidated)* 276.

4. It is contended in this case that the law only authorizes a homestead against the estate of the deceased husband or father, and not against the succession of the deceased mother. This construction of the homestead law is untenable. Such a construction would be at war with the plain meaning of the law, as well as with the obvious purposes for which it was enacted.

Succession of Mrs. Mary Coleman—Opposition of I. W. Arthur & Co. et als. to final account, 289.

5. It is manifest that the act 33 of the acts of 1865, entitled "An Act to exempt from seizure and sale a homestead and other property," was intended to apply to seizures under execution after the passage of the law, regardless of the period when the debts were contracted, upon which the judgments were rendered. When the authors of the statute undertook to enumerate the claims which they desired exempt from the operation of this law, the presumption is they mentioned all that they intended.

The law is unambiguous, and, under pretext of a construction, this court can not rightfully apply a limitation upon its operation, for this would be virtually enacting an amendment to the law, or exercising legislative powers.

If the defendants, prior to the enactment of the homestead act of 1865, had acquired a privilege or mortgage on the property in question, that right would not be impaired by the law. But this court has never decided that a judgment rendered after the passage of the homestead law, on an ordinary debt existing previously, is exempt from the operation of said homestead law.

A State has a right to pass a homestead law of the kind mentioned in this suit, and its operation against an ordinary creditor whose claim existed before its passage, in no manner contravenes the provision of the constitution of the United States prohibiting a State from enacting a law impairing the obligations of contracts.

William Doughty v. *The Sheriff et als.*, 355.

HOSPITAL.

1. The State had the right to pass act No. 60 of the acts of 1872, styled "An Act to establish a hospital for small pox, and other contagious diseases," and in the exercise of its police power to require all indigent cases of small pox or other contagious diseases to be sent by the city of New Orleans to the Luzenberg Hospital, at the expense of said city, and the defendant can be enjoined from contravening this law.

State of Louisiana ex rel. A. P. Field, Attorney General, and J. J. Hayes v. *City of New Orleans et als.*, 521.

HUSBAND AND WIFE.

1. Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed;

Held—that the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or of that of the court if the husband refused his assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs, could set up proceedings to annul.

Dennis Cronan v. *Edward Cochran et als.*, 120.

2. In this case it can not be doubted that the plaintiff had the right to manage her plantation, which was paraphernal property, and that a mandate having for its object the management thereof has a lawful object. Therefore, as there is no law forbidding the plaintiff from appointing her husband an agent to aid her in the administration of her plantation, it must be concluded that she had the right to do so.

The thing seized being raised on the plantation of plaintiff, which she administered, aided by her husband as agent, it follows that it was her separate property, and not liable to seizure by her husband's judgment creditors.

Amelia Simoneaux, Wife of Emile E. Lauve, v. *Edgar P. Helluin, Sheriff, et al.* 183.

3. The judgment of separation between plaintiff and her husband was a nullity because it was not executed by a giving in payment or by a *bona fide* non-interrupted suit to obtain payment as required by article 2428 of the Revised Code, nor was it promptly published as required by article 2429.

The conveyance under which plaintiff claims the property seized is covered by neither of the three cases mentioned in article 2446, and in the language of article 1790, such contract between husband and wife is forbidden.

Mrs. Emily Heyman v. *The Sheriff of East Feliciana et al.*, 193.

4. There is no force in the objection that the answers filed by the defendants, married women, without the authorization of their husbands, are without effect, and that the judgment against them is null, inasmuch as they were not in legal contemplation in court, and could not stand in judgment. The petition prays that the husbands be cited to appear and assist their wives in their defense. The answers are that defendants appear and for answer, etc. This is sufficient, and fulfills the requirements of the law.

Riley v. *Heirs of Riley*, 248.

5. No grave and insuperable cause exists justifying a decree of divorce

HUSBAND AND WIFE—Continued.

in this case. It was not the intention of the lawmaker that courts should be governed in their decisions of cases of this sort by the declarations and wishes of the parties themselves, acting under excitement and dissatisfaction. Their allegations of grievances insupportable, must be made good by proof, to authorize the action of the judge. It is not every family feud declared by husband or wife to be insupportable that will authorize a decree. It is in the great interests of society that the conjugal relation should not be dissolved except upon weighty and well-established reasons.

Nelson J. Scott, Husband, v. *Georgia Scott, Wife,* 594.

See Dation en Paiement, No. 1—*E. Newman & Co.* v. *Eaton and Wife,* 241.

See Community, No. 3—*Mrs. A. B. Barrow et al.* v. *J. H. Stevens, Sheriff, et als.,* 343.

INJUNCTION.

1. In this instance, where the plaintiff enjoined an order of seizure and sale issued on behalf of defendants, the judge *a quo* did not err in dissolving the injunction for the sum really due by plaintiff, and perpetuating it as to the small sum received by defendant and to be credited to plaintiff, but he should have allowed damages on the amount that was due. The remittitur by defendants is an admission that the writ issued for more than was due. The making of a remittitur does not remove the existence of the cause for the injunction, to that extent, at the date of its issuance.

John T. Michel v. *Zerilla Meyer et al.,* 173.

2. The privy, in this instance, being built upon the yard or space of ground belonging in common between the parties, the defendant had no right to place or keep said privy on it without the consent of his co-owner. *Martin Kenopsky* v. *Mark Davis et al.,* 174.

3. In this instance, the property was in the hands of the sheriff under a writ of seizure and sale, and as this court does not find that said writ was set aside, it certainly was and is the duty of the sheriff to hold the property under the writ until the injunction arresting its further execution is disposed of, notwithstanding the irregularities that have occurred. The writ of provisional seizure was expressly set aside and the injunction reversed, or resuscitated, but the executory process was not annulled, nor ordered to be vacated. If the injunction has any force, it is in arresting the sale under said process. As the sheriff, however, has done what the relator seeks in this proceeding, and has possession of the property under the writ of seizure and sale, it is unnecessary to render the decree prayed for by said relator. The rule therefore

INJUNCTION—Continued.

must be dismissed, but the sheriff is ordered to hold possession of the property.

State ex rel. E. J. Gay v. *Judge of the Fifth Judicial District Court and Sheriff of the Parish of Iberville*, 212.

SEE MORTGAGE, No. 2—*Lehman, Newgass & Co.* v. *Ranson*, 279.

SEE METROPOLITAN POLICE WARRANTS, No. 1—*Louisiana National Bank* v. *City of New Orleans*, 446.

SEE SALES, No. 17—*Lynch* v. *Mrs Kennedy and Husband*, 464.

INSURANCE.

1. Before the party insured can recover on his policy, the express condition to prevent the forfeiture of the policy—which is, that the insured shall have the notice of other insurances taken upon the same property indorsed upon the instrument, or otherwise acknowledged by the insurers in writing, must be shown to have been complied with.

The propriety of such a clause in a policy of insurance is particularly apparent in this case on account of the discrepancy of testimony. Its purpose is to enable the insurance company to protect itself, and to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on property insured by them. The rule which excludes parol evidence in such cases is well settled and strictly adhered to.

Meyers and Winehill v. *The Germania Insurance Company—Cochran & Co. et als., Subrogated*, 63.

2. Where the defendants answered that they had issued the policy of insurance sued upon at the instance of Bader, agent of the plaintiff; that, when called upon to pay the premium, he referred them to plaintiff who declined paying, on the ground that her agent must have paid it; that, afterward calling on Bader and informing him of the failure of plaintiff to make payment, he advised them to cancel the policy, which they accordingly did, wherefore they were no longer bound;

Held—That where a policy of insurance is issued without prepayment of the premium, the inference is that the insurers intended to extend a credit for its payment; that it was not at the option of the company to cancel the policy; that they only had the right to claim a dissolution of the contract for nonpayment of the premium upon putting the other party *in mora*; that Bader was only empowered to apply for the renewal of the policy, and was without instructions or authority to consent to its annulment.

Marceline Latoix v. *Germania Insurance Company of New Orleans*, 113.

3. This was merely a case of ordinary reinsurance, no policy being

INSURANCE—Continued.

issued, no written agreement being entered into, but the application for reinsurance by the Fireman's Insurance Company being entered in the books of the Pelican Insurance Company, as it is inferred to be the custom among insurance companies in cases of this kind.

If there was a stipulation *pour autrui*, or a contract whereby the Pelican Insurance Company assumed the obligation of the Fireman's Insurance Company, the plaintiff can not enforce it, because said agreement was not in writing, and the law is that the promise to pay the debt of another can not be proved by parol evidence.

Thomas G. Egan v. *The Fireman's Insurance Company and The Pelican Insurance Company*, 368.

4. It is a settled question that in an action on a valued policy of insurance the plaintiff is not put on proof of his interest in the object insured by a plea of the general issue.

In this case, however, the evidence shows that the plaintiffs had an insurable interest in the stock of goods belonging to Marks, on which they took a fire policy. They furnished Marks with goods, and upon their credit and responsibility enabled him to obtain goods from others, and subsequently paid for them. The plaintiffs' sole reliance, it seems, for payment, rested upon the fidelity and success of Marks' business. The danger of loss by the destruction of the store and Marks' stock of goods on hand constitutes a sufficient interest in the plaintiffs to sustain the policy.

The plea that the policy became void by the plaintiffs taking insurance on the same property in the New Orleans Mutual Insurance Association without notice to defendants is not tenable. The other insurance taken on the property was in the interest of a different party.

A. Roos & Co. v. *Merchants' Mutual Insurance Company of New Orleans*, 409.

5. Clark, as the agent of Mrs. Lane, having entered into a contract of assurance with defendant and paid the premium with her means, could not direct the insurance money to be paid to his own creditor; it belonged to his principal.

George D. Pritchett v. *Mechanics' and Traders' Insurance Company. Mrs. Sarah C. Lane, Intervenor*, 525.

6. When there is in the description or designation of the buildings in which the goods insured are located such misrepresentation of a material fact as to avoid the policy, the insurers are released from responsibility.

C. N. Prudhomme v. *Salamander Fire Insurance Company of New Orleans*, 695.

INTERVENTION.

1. The intervention is dismissed. The intervenor has neither alleged nor proved that she is a creditor of the defendant, whose property was sequestered.

If the intervenor had a lessor's privilege, it should have been asserted before the sequestered property was released on bond. No fraud and collusion are shown between the plaintiffs and the defendant.

The intervenor can not urge irregularities in the suit, such as insufficiency of the bond or affidavit on which the sequestration issued.

D. R. Carroll & Co. v. *H. T. Bridewell. Mrs. Lizzie Hamilton, Intervenor*, 239.

See Appeal, No. 3—*State ex rel. Mississippi and Mexican Gulf Ship Canal Company* v. *Administrators of the City of New Orleans*, 469.

See Practice, No. 7—*State ex rel. Mrs. Pecot* v. *Parish Judge of the Parish of St. Mary*, 184.

JUDGMENT.

1. According to plaintiff's own statement, his claim is based on the balance due him on a judgment in his favor of the Third District Court, parish of Orleans, against S. M. Montgomery, which judgment, by execution issued thereon, was not satisfied in full. The judgment of the Third District Court was rendered on the twelfth of December, 1863; it was affirmed on the tenth of June, 1867. Meanwhile the property was seized, and, on the fifth February, 1864, was sold to plaintiff, who claims that there is a balance of $7002 due him on the judgment.

This present suit was instituted in the Second District Court, parish of Orleans, against the representatives of the said S. M. Montgomery, deceased, to cause the plaintiff to be recognized as a creditor of the estate in the above amount to be paid in due course of administration.

It has been decided that a devolutive or suspensive appeal from a final judgment of a district court does not suspend prescription pending the appeal. Therefore prescription, running in this instance from the twelfth December, 1863, the day on which the judgment relied on by plaintiff was rendered, which judgment was affirmed on the tenth January, 1867, was not interrupted by this suit, instituted on the fifth of December, 1871, and fixed for trial on the eleventh September, 1874, on motion of plaintiff's counsel, when, on that day, the defendant filed the plea of prescription.

To revive a judgment, citation must issue from the court which rendered it. To revive the judgment sought to be enforced in this case, citation should have issued from the Third District Court.

JUDGMENT—Continued.

The suit in the Second District Court can in no sense be considered as a suit to revive the judgment of the Third District Court, and if it were, the second court, under the statute of 1853, had no power to revive it. Hence the foundation on which the plaintiff's claim rests, to wit: the judgment of the Third District Court, has been destroyed by time.

Henry Samory v. *Widow Samuel M. Montgomery*, 50.

2. This is a suit by plaintiff to annul a judgment, set aside the sale thereunder, and recover the property sold.

The marriage of the plaintiff vacated the authority conferred in the deed of mandate executed before marriage to her father, P. S. Nugent, empowering him to represent her in all suits in this State. P. S. Nugent had, therefore, no authority to confess judgment as attorney in fact for the plaintiff, at the time he did so.

But the judgment complained of was rendered also on the written consent of Frank Haynes, her attorney. His authority to consent to the judgment with a stay of execution until a certain specified time has not been denied under oath by the plaintiff, and until thus denied the defendant was not required to prove it.

The attorney was a sworn officer, bound by his oath to act correctly in the pursuits of his profession. Thus situated, it is not to be presumed that he acted without proper authority. On the contrary, every presumption is in favor of his having pursued the proper course of conduct, unless the contrary should be suggested on affidavit.

In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular.

M. A. Dockham and Husband v. *Jonathan Potter*, 73.

3. The judgment of separation between plaintiff and her husband was a nullity because it was not executed by a giving in payment or by a *bona fide* non-interrupted suit to obtain payment as required by article 2428 of the Revised Code, nor was it promptly published as required by article 2429.

The conveyance under which plaintiff claims the property seized is covered by neither of the three cases mentioned in article 2446; and in the language of article 1790, such contract between husband and wife is forbidden.

Mrs. Emily Heyman v. *The Sheriff of East Feliciana, et al.*, 193.

4. A judgment acquiesced in and partially executed can not be appealed from.

The plea that acquiescence in a judgment can not be given by a

JUDGMENT—Continued.

police jury so as to prohibit a parish from appealing from a judgment rendered against it, is not tenable. There is no reason why a parish should not be bound by the acts of its agent as an individual would be.

C. K. David v. *The Parish of East Baton Rouge*, 230.

5. Here two married women, sisters, are sued jointly as heirs of their mother. Judgment is rendered against them jointly, each for her half of the debt against their ancestor. Neither is bound to pay the other's share of the debt. When, therefore, they sign reciprocally each other's appeal bond, each becomes bound as surety for the other's debt. The authorities cited in support of the motion to dismiss the appeal refer to cases where the surety on the appeal bond is bound by the judgment to pay the debt for which he stands surety. The motion can not prevail.

There is no force in the objection that the answers filed by the defendants, married women, without the authorization of their husbands, are without effect, and that the judgment against them is null, inasmuch as they were not in legal contemplation in court, and could not stand in judgment. The petition prays that the husbands be cited to appear and assist their wives in their defense. The answers are that defendants appear and for answer, etc. This is sufficient, and fulfills the requirements of the law.

Isaac F. Riley v. *Heirs of E. M. Riley*, 248.

6. Proceedings were taken in the Sixth District Court of New Orleans to revive the judgment obtained by the plaintiff against one Richard Nugent, and on which he rests his claim in this suit. Citation was made on Nugent, then an adjudged bankrupt, discharged from all liability on the judgment, and having no interest whatever in the matter. The citation was, therefore, null and void, and the judgment which followed void also. The plea of prescription against plaintiff must prevail.

Charles E. Alter v. *James McCullen*, 251.

7. On the fourth of March, 1865, defendant bought from Peter Mackley the property in dispute, and was put in possession of the same. On the thirteenth day of September of the same year, Ashworth obtained a judgment against Mackley in the following words: "By reason of the law and evidence being in favor of plaintiff in the within suit, it is hereby ordered, adjudged and decreed, that plaintiff do recover judgment as prayed for."

The certificate of the recorder of mortgages shows that this judgment was recorded thus on the twenty-sixth of September, 1865: "A judicial mortgage in favor of James Ashworth v. Peter Mackley as prayed for."

JUDGMENT—Continued.

On the thirteenth of October, 1865, a *fieri facias* issued in the case of Ashworth *v.* Mackley, and the sheriff in his return states he seized the property in controversy, as the property of Mackley, and advertised and sold the same.

There is nothing in the above mentioned return, or in this record, to show that the property was ever in the possession of the sheriff. The opinion of the deputy sheriff that he seized the property is not sufficient. He should have stated facts showing how he effected the seizure. So far as the record shows, the defendant was not disturbed in his possession until after the sheriff's sale.

In the mean time, Mackley, the vendor, and Carrane, the vendee, having learned that the recorder had made an error of description in the deed of sale from the one to the other, went together before the recorder, and by a public act, which was duly recorded, corrected the mistake.

There is no force in the assertion that, inasmuch as the judgment of Ashworth against Mackley was recorded before the correction of the misdescription of the property sold to Carrane, the judicial mortgage in favor of Ashworth attached, and the correction was made too late. There was not a registry of such a judgment as could create a mortgage against the property. The judgment specified no amount, and the registry thereof gave no notice to third parties. There was no seizure, and there could be no legal sale of the property, because the sheriff did not take possession.

Alexander Lirette v. *John Carrane*, 298.

8. A judgment is not completed and can not operate as a judicial mortgage or have any effect until it is signed. It is the recording of a judgment that gives a judicial mortgage, and until a final judgment is signed it is no judgment.

Widow Elizabeth Marchal v. *Harriet Hooker et als*, 454.

9. Where a judgment of partition and sale was rendered without all the parties in interest being parties to the suit of partition, said judgment is an absolute nullity, and the sale made under it is also null and void. *Succession of Ernest Poree*, 463.

10. Under the circumstances of the case, a mere clerical error, such as Joseph N. Robert for F. J. Robert, in the decree of the court from which an appeal is taken, can be corrected by this court in revising the judgment. The defendant, who raises the objection, is estopped by his judicial admissions from denying that he is the party condemned at the trial below. *Felix Formento* v. *F. J. Robert*, 489.

11. There is no force in the objection that the Louisiana National Bank has enjoined the city and the respondent from receiving Metropolitan Police warrants for licenses, because that was virtually a

JUDGMENT—Continued.

consent judgment, and the rule is, such judgments are binding only on the parties.

State ex rel. Lubie v. *Administrator of Finance, City of New Orleans*, 493.

12. Notice of subrogation to a judgment, served after the seizure thereof, has no effect to disturb rights acquired previously.

It was absurd for the succession of P. C. Lemane, having judgment for $700 against Henry Lemane, to seize thereunder the judgment of the latter against the succession of P. C. Lemane, for $500. At the time of the seizure the respective judgments were compensated. The law tolerates no such absurdity as a judgment creditor seizing a judgment against himself.

The objection that this court is without jurisdiction because the judgment seized and which the third opponent claims as subrogee, does not exceed five hundred dollars, is unfounded. At the time of the seizure the judgment and interest exceeded that sum.

Widow P. C. Lemane, Administratrix, v. *Henry Lemane. Ignace Halum, Third Opponent*, 694.

SEE APPEAL, NO. 2—*R. Esterbrook and A. Gallier* v. *Mary E. Gauche*, 36.

SEE PRIVILEGE, NO. 12—*New Orleans Canal and Banking Company* v. *The Recorder of Mortgages of the Parish of Pointe Coupee*, 291; AND NO. 14—*Nicolson & Co.* v. *Citizens' Bank*, 369.

SEE OBLIGATIONS AND LIABILITIES, NO. 14—*Stevenson* v. *Lavinia Edwards et als.*, 302.

SEE MORTGAGE, NO. 8—*Mathilde Morrison* v. *Citizens' Bank et als.*, 401.

SEE SALES, NO. 15—*Edwards* v. *Fairbanks & Gilman*, 449.

SEE EVIDENCE, NO. 24—*Spears, Tutor*, v. *Mrs. Spears, Administratrix*, 537.

SEE BANKRUPTCY, NO. 4—*Keeting* v. *Arthur, Stone & Co.*, 570.

JURISDICTION.

1. This is a personal action against the owners of a steamboat, the vessel being seized to enforce a lien accorded by a State law, under the conservatory remedy of provisional seizure. It is not a proceeding *in rem* to enforce a maritime lien. Therefore there is no force in the objection that the State court was without jurisdiction.

The State court, having once obtained lawful jurisdiction over the parties and subject matter, could not be subsequently divested thereof by the bankrupt court.

Congress has not only not deprived other courts of jurisdiction over such cases, but it has provided for their prosecution and defense in those courts by the assignee in bankruptcy. This principle applies

JURISDICTION—Continued.

not only to all ordinary actions to collect debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute or remains unascertained.

E. A. Switzer v. *John Heinn and Mary Heinn, Owners of the Steamboat Frolic*, 25.

2. A suit instituted in a court without jurisdiction interrupts prescription. *Henry J. Sorrell* v. *Victor Laurent*, 70.

3. Courts have no power to promulgate laws, and none of course to render orders to others to promulgate them. If violation or remissness of official duty has occurred among those who are by the constitution authorized to enact and promulgate laws, the correction is to be sought within the powers of the legislative and executive departments, and not within those of the judicial.

State of Louisiana ex rel. The Crescent City Waterworks Company v. *P. G. Deslonde, Secretary of State*, 71.

4. In this suit, instituted by plaintiff to recover his share in the succession of his grandfather and grandmother, the only question being whether the Second District Court, parish of Orleans, had jurisdiction to issue the order of sale to operate said partition;

Held—That the court *a qua* did not err, under the state of facts existing in the case, and by virtue of article 924 of the Code of Practice, in maintaining its jurisdiction. Having jurisdiction, it could order the sale of the property to be partitioned, and it follows that the liens and mortgages on the property sold were shifted to the proceeds. The opponent, Sickerman, retains his right to participate in said proceeds to the extent of his mortgage. The purchasers of said property could not be compelled to pay the price before they were tendered an unencumbered title, and all that they required was the erasure of the mortgages on the property sold. *Charles Diamond* v. *Robert E. Diamond et als.*, 125.

5. In this instance a writ of injunction was issued by the Superior District Court, at the suit of plaintiffs, restraining the city of New Orleans from enforcing any claim against them for pretended levee dues, wharfage or port charges, and prohibiting W. L. Evans, a justice of the peace, from further proceeding in certain specified cases pending before his court.

An exception was correctly taken to the jurisdiction of the Superior District Court. The constitutionality of the tax imposed by the city being in question, an appeal lay directly from the justice's court to this court. The city had the right to bring those suits before the tribunal having the proper jurisdiction of them.

Wm. G. Wilmot et als. v. *The City of New Orleans et al.*, 158.

JURISDICTION—Continued.

6. One must be sued before the judge having jurisdiction of the place of one's domicile, except in the cases provided in the Code of Practice. The case of a factor having a lien for his advances on a crop is not embraced in the excepted cases.

A court without jurisdiction to try the principal demand can not try an issue accessory thereto. A court that can not determine whether or not a debt exists, for want of jurisdiction, can not decide that there is a privilege, because the latter can not exist without the former.

A sequestration is merely a conservatory order. A court without jurisdiction of the case can render no order whatever binding the parties, and consent can not give jurisdiction.

Edward J. Gay & Co. v. *Eaton & Barstow*, 166.

7. The defendant objected to the jurisdiction of the court below on the ground that he was, as alleged in the petition, a citizen of the State of New York. A citizen of that State can be sued in the courts of this State. He may cause the case to be removed to the United States courts by following the statutes upon this subject. But if sued, cited and served with copy of the petition, he can not plead his domicile, for the reason that, in so far as this State is concerned, he has no domicile.

Perkins & Billiu v. *Charles Morgan*, 229.

8. In this court the intervenor has filed an affidavit in which she charges that the person who represented her in the court below had no authority to do so. This is a matter which this court can not discuss originally.

Peter Boreland v. *Henry Leckie. Miss M. M. A. Calhoun, Intervenor*, 235.

9. In this case no sentence having been pronounced, and no fine imposed in the court *a qua*, the plea to the jurisdiction of this court, founded on article 74 of the constitution, must prevail.

The State of Louisiana v. *Matilda Brown, Martha Brown and Chapman Epps*, 236.

10. The peremptory exception to the jurisdiction of a special judge to issue an order granting letters of executorship *ratione materiæ* was properly overruled. Under the facts of this case the parish judge proceeded lawfully in selecting a lawyer having the proper qualifications to preside over the trial in his place.

Succession of Mrs. S. B. Fuqua, 271.

11. As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and

JURISDICTION—Continued.

resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferer, the payee thereof, was a citizen of this State and had no such right.

New Orleans Canal and Banking Company v. *The Recorder of Mortgages of the Parish of Pointe Coupee et als.*, 291.

12. In the exercise of its probate jurisdiction the parish court can sell succession property, as was attempted in this case, because it is a power essentially necessary in the settlement of successions, and as an incident to the right to sell, the parish court has jurisdiction to enforce the remedies provided by law against a bidder who refuses to comply with his bid.

A sale *a la folle enchere* is a lawful sale which the parish court may make in the exercise of its probate jurisdiction; and an injunction of a sale of this character is as much probate in nature as an injunction of the first sale, or the first offerings.

Service of the order to give security was made in this case upon the attorney at law of the testamentary executor, said executor being at the time absent from the State. This is sufficient.

When the testamentary executor of the deceased fails to give security, or from any other cause can not discharge the duties of his office, the judge must appoint the public administrator of the parish. The act of 1870, establishing the office of public administrator, repeals former laws on the subject.

Succession of William Bobb—Ernest Merilh v. *W. L. Hodgson, on Injunction herein and on Opposition to Application for Dative Executor*, 344.

13. It would be improper to attempt to decide anything in regard to the title of the property in controversy, even if the court had jurisdiction, as the vendee is not before the court, and it would be no less wrong to make an order to put the legatee in possession of property which is shown to have passed out of the succession, and the possessor is not before the court.

It is manifest that the judgment decreeing the title of the property to be still in the succession is wrong, as no such allegation or prayer is made in the petition.

It is equally clear that if it had been made, the parish court would have been *ratione materiæ* without jurisdiction to try that question, as the value of the property exceeded five hundred dollars.

Succession of Joseph Ricard, 365.

14. Until the error in the judgment condemning Joseph N. Robert instead of François J. Robert was corrected, execution could not issue against the said François J. Robert, because he was not con-

JURISDICTION—Continued.

demned in the decree, and as the case was pending for revision in this court, the judge *a quo* was without jurisdiction and could not change the decree.

Felix Formento v. *Francis Joseph Robert*, 445.

15. The defendants in this instance are the legal representatives of one Zeller, who went security on a release bond given in the suit of Switzer *v.* steamboat Frolic. The defense is that the assignee in bankruptcy for the owners of steamboat Frolic had no right to stand in judgment for said owners, and that the State court had no jurisdiction to render a judgment against the assignee. This defense is not well founded. The bankrupts having been discharged, no judgment against them could be obtained, and there is nothing in the bankrupt law which required the discontinuance of suits already commenced.

Edgar A. Switzer v. *Mrs. M. A. Seller et als.*, 468.

16. The motion to dismiss the appeal of Glover & Odendahl, on the ground that the court is without jurisdiction because the amount in controversy is below five hundred dollars, must be overruled, the proceedings in the case being considered in the nature of a *concursus*. *Smith & McKenna* v. *Edwin Charles*, 503.

17. By the confirmation by Congress, on the third of March, 1857, of the selections made by the State of lands granted to her by the act of Congress, approved March 2, 1849, and the act approved September 28, 1850, and by the act of the State No. 104, of the acts of 1871, confirming all sales and locations of public lands made by the State from the first day of January, 1861, to fourteenth October, 1864, the land in controversy in this instance was severed from the public domain, and the subsequent grant thereof by the United States in no manner impaired or defeated the title previously acquired by the State and transferred to plaintiff.

The position taken by defendant that the land department decided the land to belong to him, and that their action precludes the investigation and determination of the case by this court, is unfounded.

The officers of the land department may adjudicate the title of the United States, and to that extent the adjudication is final. It is not for this court, or any other, to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to lands. But if the United States, at the moment of the adjudication, had no title to the land in question, this action of the officers of the land department gave the defendant none, and the question whether the United States had any title at the time of the adjudi-

JURISDICTION—Continued.

cation is clearly a question for the courts of justice, and not for the officers of the land department to decide.

James Marks v. *C. C. Martin*, 527.

18. Appeals from the Superior District Court of New Orleans are returnable at New Orleans. That court, therefore, was without authority to make this appeal returnable at Monroe. Consent can not give jurisdiction, neither can consent change the law which designates the place where appeals shall be returnable.

The Citizens' Bank of Louisiana v. *The Board of Liquidation*, 543.

19. The exception to the jurisdiction of the district court was properly maintained. The execution having issued from the parish court, the parish court was the proper court to apply to for an injunction to restrain property seized under the judgment from being sold. The value of the property to be sold is not to be considered. If the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of the property not subject to seizure. *G. W. McGinty* v. *W. L. Richmond, Sheriff, et al.*, 606.

20. A. L. Gusman, alleging an interest in the affairs of a defunct insurance company, applied to the judge of the Superior District Court, parish of Orleans, for a mandamus to compel M. A. Pike and John A. Pike who had possession of the books of the company, to grant him access to the same for examination. On the writ being made peremptory, the relators M. A. Pike and John A. Pike moved for a suspensive appeal, which being granted was subsequently set aside and permitted to operate only as a devolutive one. Whereupon relators applied to this court for a writ of prohibition to be directed to the judge *a quo* and the civil sheriff of the parish of Orleans, restraining them from proceeding in the premises. As there is nothing in the record to show that there is an amount exceeding five hundred dollars in dispute, this court has no jurisdiction *ratione materiæ*.

State ex rel. M. A. Pike and John A. Pike v. *The Judge of the Superior District Court, Parish of Orleans*, 676.

21. No complaint being made as to the sufficiency of the surety, the district judge dismissed the appeal mainly upon the ground that the matter in controversy does not exceed five hundred dollars. After granting the appeal, his jurisdiction over the case, except as regards the sufficiency and legality of the bond, was gone.

State ex rel. Alexis Ribet v. *Judge of the Third District Court, Parish of Orleans*, 684.

SEE CRIMINAL LAW, No. 5—*State* v. *George Fritz, alias George Frey*, 360.

JURISDICTION—Continued.

See Surety, No. 7—*Kimbrough, Administrator*, v. *Walker et als.*, 566.

See Widow, No. 3—*Succession of Callie N. Newman*, 593.

See Sales, No. 23—*Duckworth* v. *Vaughan et als.*, 599.

See Action, No. 11—*Lay et als.* v. *Succession of Elias O'Neal*, 643.

See Succession, No. 9—*De La Ferriere* v. *Succession of England*, 686.

See Taxes and Tax Collectors, No. 13—*State ex rel. Norcross* v. *Judge of the Fourth District Court, parish of Orleans*, 704.

JURIES AND JURORS.

1. This court is not aware of the existence of any constitutional provision making it imperative upon the Legislature to accord a trial by jury in all civil cases. It was competent for the law-making power to provide that cases like the present one should be tried without the intervention of a jury. Therefore it had the right to prescribe, as it did in this class of cases, that issues of the sort here presented should be tried by a jury, if any party to the suit pray for it; and to provide, in the event the jury do not agree, or fail to render a verdict either for the plaintiff or defendant, that the case be determined by the judge.

C. S. Sauvinet v. *Joseph A. Walker*, 14.

2. The two sections 2125 and 2153 of the Revised Statutes must be construed together, and the section 2153, allowing in certain cases a special jury, or requiring jurors to possess information peculiar to some trade or occupation, means, of course, that they are otherwise competent jurors, possessing the qualifications prescribed in the other section 2125. *William Golding* v. *John Petit*, 86.

3. Under the act of 1868, Revised Statutes 2127, the jury must be drawn by the parish judge, clerk, and sheriff. The drawing for the term was made by the parish judge, clerk, recorder, and the sheriff. Therefore all the officers required by law to draw the panel were present and officiated in the act. The placing in the order of the judge for the drawing at that term the additional officer, the recorder, was, doubtless, an oversight, and may be regarded as surplusage. The objection to the drawing has no weight.

Christopher Hunt v. *John Mayo*, 197.

4. Before the jury was impanneled, defendant objected through his counsel to the impanneling of the jury because he had not been served with a copy of the indictment and a list of jurors who were to pass upon his case, two entire days before his trial. The court *a qua* erred in overruling the objection and proceeding to trial.

State of Louisiana v. *Joe Guidry*, 206.

LACHES.

1. The plaintiff sues to recover from defendants, testamentary executors of Wilhelmus Bogart, a certain sum of money, which, while plaintiff was a minor, said Bogart, acting in the capacity of under tutor, had under his control and management. After becoming of age, plaintiff received, in settlement with Bogart, certain promissory notes and commercial papers in which Bogart had invested plaintiff's funds in 1860, and of which a considerable portion subsequently turned out to be worthless. After having kept the aforesaid obligations until 1871, a period of seven years, and after prescription has accrued, he now tenders them back on the ground of his having been induced to receive them in settlement by fraudulent misrepresentations.

If said obligations and commercial papers were worthless at the time he received them, plaintiff must have become acquainted with that fact not long after, and might have used more diligence in seeking redress, when it was in his power to put the other party in the same situation he was in when delivering the assets to plaintiff. Therefore by his own laches the plaintiff has foregone the right he originally had to exact from the manager of his affairs a rigid accountability.

Bogart Shall v. *P. H. Foley and W. B. Conger, Testamentary Executors of Wilhelmus Bogart*, 651.

LAWS AND STATUTES.

1. Although "due process of law" generally implies and includes regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding, yet this is not universally true. It does not apply to proceedings to collect the public revenue.

The revenue bill fixes the amounts of the license taxes due by retail merchants and retailers of spirituous liquors, and the act No. 47, of 1873, provides the manner in which taxes and licenses shall be collected from delinquent parties. This is sufficient. It is the mode provided by the legislator for enforcing a right of the sovereign and is *due process of law.*

The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

William L. McMillen v. *Robert K. Anderson*, 18.

2. The Governor had no authority to consent to the transfer of this case, and to employ counsel as he did. The Attorney General is the proper officer to represent the State in all her law suits, and

LAWS AND STATUTES—Continued.

the act 21, of the acts of 1872, on which the Governor relied, was not intended to deprive the Attorney General of the control and management of his cases, but only to provide for certain contingencies in which he may designate an attorney to act on behalf of the State. Under that statute he was empowered to appoint counsel to act in this suit.

State ex rel. Baldwin v. *Dubuclet, State Treasurer—State of Louisiana, Intervenor*, 29.

3. The will relied on by Mrs. Burke, a third claimant, is valid, and under it she is entitled to the property of Hampton Elliot as far as he was able to make a testamentary disposition thereof according to the laws of Mississippi, the place of his domicile, and where the will under consideration was made. It is not sufficiently proved that the parties lived in open concubinage and were therefore not capable of making donations to each other, except to the limited extent allowed by article 1481 of the Revised Code of 1870.

The rights of Mrs. Elliot, the surviving widow and fourth claimant, must be determined by the laws of Mississippi. According to those laws, said widow is entitled to one-half of the personal property of the deceased.

The immovable property is controlled by the laws of this State and passed under the will to Mrs. Burke.

Succession of Hampton Elliot, 42.

4. The two sections 2125 and 2153 of the Revised Statutes must be construed together, and the section 2153, allowing in certain cases a special jury, or requiring jurors to possess information peculiar to some trade or occupation, means, of course, that they are otherwise competent jurors, possessing the qualifications prescribed in the other section 2125. *William Golding* v. *John Petit*, 86.

5. Under the act of 1868, Revised Statutes 2127, the jury must be drawn by the parish judge, clerk and sheriff. The drawing for the term was made by the parish judge, clerk, recorder and the sheriff. Therefore all the officers required by law to draw the panel were present and officiated in the act. The placing in the order of the judge for the drawing at that term the additional officer—the recorder—was, doubtless, an oversight, and may be regarded as surplusage. The objection to the drawing has no weight. *Christopher Hunt* v. *John Mayo*, 197.

6. It is a rule of general jurisprudence, as well as a principle of public policy, to construe the redemption laws liberally. The object of the State is to collect the revenues, and not to deprive its citizens of any rights.

LAWS AND STATUTES—Continued.

It is not to be deduced from the act No. 47 of the acts of 1873 that it takes away from creditors and all other parties interested, except the owner, the right of redemption which they had formerly enjoyed. If a mortgagee is a species of owner or quasi owner, as the doctrine is, he is embraced in the exception made by the express words of the statute.

Charles E. Alter v. *Henry Shepherd et als.*, 207.

7. Section 1067 of the Revised Statutes does not repeal article 338 of the Code of Practice in regard to the recusation of judges.

State ex rel. O. Provosty, District Attorney v. *Judge of the Seventh Judicial District Court*, 225.

See Privilege, No. 1—*Mrs. O. K. Dunning* v. *Coleman & Co.*, 47.

See Prescription, No. 2—*Cohen & Wilson* v. *Golding & Lacroix*, 77.

See Action, No. 4—*Cronan* v. *Cochran et als.*, 120.

See Levees, No. 2—*Louque* v. *Louisiana Levee Company*, 134.

See Taxes and Tax Collectors, No. 4—*City of New Orleans* v. *Cazelar*, 156.

See Sheriff's Fees, No. 1—*City of New Orleans* v. *Patton, Sheriff*, 158.

See Offices and Officers, No. 2—*State* v. *Jonas*, 179; and No. 6—*State on Information of J. B. Cooper* v. *Schumaker et al.*, 332.

See Markets, No. 1—*City of New Orleans et als.* v. *James Stafford*, 417.

See Bonds, No. 9—*State ex rel. Forstall* v. *Board of Liquidators*, 577.

See Sales, No. 24—*Copley* v. *Dinkgrave*, 601.

LESSOR AND LESSEE.

1. The effects of a third person equally with those of the lessee are, by article 2707 of the Civil Code, made subject to the lessor's privilege, when they are by his consent contained in the house or store of the lessor. By analogy it would seem that the privilege would continue to attach like those of the lessee, and on the same conditions, for fifteen days after removal. But, by the well-established rule that privileges are *stricti juris*, this court is precluded from assuming that the effects of a third person are affected by the lessor's privilege after their removal from his house or store. The law declares a privilege in favor of the lessor on the property of third persons only on the conditions imposed in article 2707 of the Code, and to those conditions it is thought that the privilege must be restricted.

E. T. Merrick, Race & Foster v. *Emile La Hache. St. Louis Piano Manufacturing Company, Intervenors*, 87.

LESSOR AND LESSEE—Continued.

2. The proprietor of a building leased to a tenant is not liable in damages to third parties resulting from the use to which the tenant may put the leased property, unless it be shown that, at the time the lease was made, he knew the uses and purposes the tenant would apply it to, and that such use, from the nature of the business, would prove a nuisance.

Michael Muller v. *H. L. Stone and Willoz & Rostand. Mary Catherine and William Muller, Intervenors*, 123.

3. There is certainly nothing immoral in renting property to be used as a club room, and if it was converted into a gambling house, this is no reason why the lessee should not be bound by his contract, when there is no evidence that the lessor knew that the object for which the rooms were to be employed was different from the one mentioned in the written lease.

Mrs. L. P. Commagere v. *William Brown*, 314.

4. The right of the lessor to detain the movables subject to his privilege until the rent is paid is not incompatible with the right of an ordinary creditor to enforce his rights against the same property without depriving the lessor of any portion of his debt for rent. The payment spoken of in article 3218 of the Civil Code does not necessarily mean payment of the lessor's debt by the adverse creditor before the latter is permitted to proceed against the property. The creditor seeking to enforce his claim, as in this case, might be unable to advance the amount of the lessor's debt for rent, and thus by his poverty be debarred from pursuing a legal right, which, if enforced, would realize money sufficient to pay the lessor in full and leave a surplus for himself.

The lessor can not prevent a sale of the lessor's property, on the pretense that it would not bring the amount of his debt. No right of his is violated by a sale made in the exercise of a legal right of another against the property. If the lessor's right is preserved, if his debt is paid in whole or in part only, in case the entire proceeds of the property subject to his privilege are insufficient to pay it all, he has no just ground to complain. His rights can only be exercised concurrently with the right of others on the same property.

The assumption on the part of the lessor of the right of detention of the lessee's property continuously, unless his entire privileged debt is paid, would put the rights of others in abeyance and destroy that condition of equality before the law which all are entitled to occupy in asserting their rights in the courts of the country.

Nothing is better settled in our jurisprudence than that a creditor

LESSOR AND LESSEE—Continued.

who has a mere right of preference on the proceeds of property seized under execution has not the legal right to arrest the sale of the property, but is given the right to interpose his opposition and claim the proceeds under a distribution to be made according to law.

The injunction prayed for in this case was illegally issued. The remedy of the lessor was by third opposition, claiming her priority of privilege on the proceeds of the property seized and subject to her privilege.

Frank F. Case, Receiver, v. *H. W. Kloppenburg et al. Same* v. *William Schneider. Consolidated.* 482.

5. Plaintiff was the lessee of the plantation seized by these defendants as the property of one Mrs. Bell, the defendant in execution; and being the lessee, he was the owner of the seventy-seven bales of cotton raised by him on said plantation in 1869, which were seized and disposed of by defendants. That he was the lessee in 1868 can not be doubted. Whether the husband of Mrs. Bell had authority as agent to execute to him the lease for 1869 is immaterial, inasmuch as he remained on the place after the expiration of the lease of 1868, and continued to cultivate with his own means the plantation in 1869. The lease was continued by tacit consent.

That plaintiff signed the injunction bond as security for Mrs. Bell, when she resisted the execution of defendants' judgments, does not estop him from claiming to be the owner of the twenty-seven bales of cotton involved in this controversy. There the ownership of the cotton was not at issue, the right of defendants to execute their judgments against Mrs. Bell being then the subject of inquiry.

The mere seizure of the mortgage property in June, 1869, did not divest plaintiff of the title to the crop which he was raising on the plantation leased for 1869. That seizure in no manner disturbed him in cultivating the place. It was after plaintiff had shipped from the place sixty bales of cotton, and was about shipping the twenty-seven bales in dispute that defendants made the seizure and disposition of the cotton.

If the plantation had been sold by the sheriff pending the lease, under the mortgage previously executed, containing the *non alienando* clause, the sale would have dissolved the lease, and the purchaser could have taken possession. But it was not so. Under the circumstances of the case, the seizure of the cotton which belonged to plaintiff and the disposition of it was unjustifiable and wrong. *William Sandel* v. *D. B. Douglass, Sheriff, et als.*, 628.

LETTER OF CREDIT.

1. On the faith of a letter of credit given to them by defendants for $5000, Fish & Butler procured the discount of a draft of $3500, and some time afterward one of $1500, from plaintiff, a banker in New York. On defendants being sued for payment of the latter draft, they rely on a defense which is merely technical. A letter of credit must be interpreted and effect given to it according to the real intention of the parties. In accomplishing that object, it was immaterial whether the drafts were drawn by Fish & Butler in favor of their respective creditors as required in the letter of credit, or in favor of the drawers themselves, to settle with said creditors, as intended, and as they did.

Both drafts were drawn alike, and when John Williams & Sons accepted and paid the first one for $3500 they thereby conceded there was no objection to the form or wording of the instrument, and they interpreted the letter of credit as the drawers did, and as this court does.

Henry Talmadge v. *John Williams & Sons*, 653.

LEVEE DUES AND WHARFAGE.

1. The second article of the city ordinance to regulate the levee dues and wharfage on ships and vessels arriving from sea, and on steamboats, flatboats, etc., arriving at the port of New Orleans, approved February 11, 1853, which provides "that from and after the first of January, 1855, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as stated in said ordinance," is not in conflict with the provisions of the constitution of the United States.

J. W. Cannon v. *City of New Orleans*, 16.

2. In this instance a writ of injunction was issued by the Superior District Court, at the suit of the plaintiffs, restraining the city of New Orleans from enforcing any claim against them for pretended levee dues, wharfage, or port charges, and prohibiting W. L. Evans, a justice of the peace, from further proceeding in certain specified cases pending before his court.

An exception was correctly taken to the jurisdiction of the Superior District Court. The constitutionality of the tax imposed by the city being in question, an appeal lay directly from the justice's court to this court. The city had the right to bring those suits before the tribunal having the proper jurisdiction of them.

Wm. G. Wilmot et als. v. *The City of New Orleans et al.*, 158.

LEVEES AND LOUISIANA LEVEE COMPANY.

8. The purpose of the laws is clearly that the work of constructing, repairing, and strengthening the levees shall be done under plans, surveys, measurements, and directions to be furnished by a board

LEVEES AND LOUISIANA LEVEE COMPANY—Continued.
or commission of engineers, for the appointment of which the law provides, and the Louisiana Levee Company will not be held responsible in damages to individuals except in certain cases and according to the provisions recited in section 5 of act No. 4, of the acts of 1871, page 33.

N. Louque v. *Louisiana Levee Company*, 134.

4. It is in evidence that the Louisiana Levee Company, defendant in this case, made no contract with plaintiffs, the executors of Elder, but that said executors finished the work for which Elder had contracted, and that the balance due by the company was the amount for which the company confessed judgment. It is immaterial whether the succession of Elder was insolvent or not, as far as the responsibility of the Levee Company, under its contract, is concerned. When the company pays the whole price for which it was bound for the work, whether the price was paid to Elder or to his executors, it is discharged from all further responsibility.

White and Tomkins, Executors, v. *Louisiana Levee Company*, 295.

LIBEL.

1. The defendants in this case, by publishing the contents of an affidavit which was false and malicious, in the manner and with the comments they did, in a widely circulating newspaper, gave the false charges against the plaintiff an extensive circulation, and imparted to them an air of authenticity which they would not otherwise have had, and which this court may well suppose to have had a strong tendency to injure the character of the plaintiff. It is no justification to the defendants that they believed the affidavit to be true. Their belief in the truth of the charges tended rather to increase the bad effect of them against the plaintiff.

That the defendants have condoned for the publication of the offensive article in which this suit originated, by publishing an exculpatory letter of the plaintiff's attorney, affords no escape from the responsibility in damages to the injured party. The reparation of the injury, to the extent that the publication of exculpating and explanatory matter may be supposed to have made reparation, may be considered, and goes only in mitigation of damages. Thousands may have read the libelous matter that never saw its refutation.

It does not avail to say that the defendants had no malice or ill feeling against the plaintiff. In all cases of this sort, where the charge is false, the law implies malice in the publisher, not malice in the sense of hatred, spite or revengeful feeling toward the party assailed, but as showing an evil disposition, the *malus animus* which induced him wantonly, recklessly or negligently, in disregard of the rights of others to aid the slanderer in his work of defamation

LIBEL—Continued.

by giving to him the powerful influence of the public press—written or printed slander being justly considered more pernicious than that uttered by words only.

In an action of libel proof of damages from the publication is not necessary to recover. The actual pecuniary damages in such actions can rarely be proved, and is never the sole rule of assessment. *James M. Cass* v. *New Orleans Times*, 214.

2. Defamation by libel is the offense charged. Sections 804 and 1051 R. S. take this case out of the strict rules of the common law, and the purport only of the libelous letter as given in the information is sufficient. It was not essential that the information should have alleged that the letter was written in the German language in order to permit the State to introduce the letter and an authorized translation. The law of evidence upon this subject is complied with, if the matter or purport of the instrument offered conform to the purport and description thereof in the information. The law did not require the libelous letter to be set out in full, or a copy of it to be contained in the information.

State of Louisiana v. *H. H. Willers*, 246.

3. Article 443 R. C. C. does not protect corporations from civil prosecutions for damages *ex delicto*. Corporations have been held responsible for acts done by their agents *ex contractu* and *ex delicto*.

A corporation may sanction the publication of a libel, and in such case the corporation is the publisher of the libel, and liable in like manner as an individual, not because, as is sometimes said, a corporation may act with malice, but because it has a capacity for voluntary action, and is responsible for such action.

It is as possible fos a corporation as for an individual to act maliciously, to wit: with a bad intent. Accordingly, it has been held that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as might imply malice in law sufficient to support the action; and there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity.

Benito Vinas v. *Merchants' Mutual Insurance Company of New Orleans*, 367.

LIS PENDENS.

See Practice, No. 2—*Wooldridge* v. *Monteuse*, 79.

MANDAMUS.

1. There is nothing in the act for "funding the obligations of the State," relied on by relator, which confers on him or implies a right or duty, as "Fiscal Agent," to recover from the State Treas-

MANDAMUS—Continued.

urer, and to hold and account for, under the obligations of his official bond, all the moneys belonging to the State, or to choose a bank for such purpose, and nothing which imposes on said treasurer the duty to deposit said moneys with the relator, and therefore there is no cause for the mandamus prayed for.

It is only where a specific, ministerial duty is imposed by law on an officer, that the writ of mandamus can properly issue against him. The term "fiscal agent" does not necessarily mean depositary of the public funds, so as, by the simple use of it in a statute without any directions in this respect, to make it the duty of the State Treasurer to deposit with him any moneys in the treasury and confer on such agent power to compel such deposit.

State ex rel. Baldwin v. *Dubuclet, State Treasurer—State of Louisiana, Intervenor*, 29.

2. Courts have no power to promulgate laws, and none of course to render orders to others to promulgate them. If violation or remissness of official duty has occurred among those who are by the constitution authorized to enact and promulgate laws, the correction is to be sought within the powers of the legislative and executive departments, and none within those of the judicial.

State of Louisiana ex rel. The Crescent City Waterworks Company v. *P. G. Deslonde, Secretary of State*, 71.

3. The plaintiff has failed to prove his allegations that there was, at the time of making his demand, money in the city treasury specially designated and set apart for the payment of judgments. Failing in this, he was clearly without the right to the proceeding by mandamus, even if he could otherwise have resorted to it.

State of Louisiana ex rel. Thomas Lynne v. *John Calhoun, Administrator of Public Accounts et al.*, 167.

4. A mandamus will not lie against the Auditor to make an estimate and fix the rate of the tax provided for by act 69 of the acts of 1870. As long as this duty was imposed by law upon the Auditor, he could by mandamus be compelled to perform it. But when by acts 3, 4 and 55 of the acts of 1874, the law imposing this duty was repealed, and it was made a penal offense for him to do any act obstructing the funding of the obligations of the State and the other provisions of said statutes, a mandamus can not be invoked.

The question whether the State by her legislation on the subject has impaired the obligations of her contract with the relator, is a matter that can not be decided in this controversy, because the State is not a party to the suit, and the Auditor has no interest in

MANDAMUS—Continued.

the solution of the question. The same remark is applicable to the other constitutional objections raised by the relator.

State ex rel. John L. Macaulay v. *Charles Clinton, Auditor*, 429.

SEE APPEAL, No. 34—*State ex rel. Mississippi and Mexican Gulf Ship Canal Company* v. *The Administrators of the City of New Orleans*, 469; AND No. 49—*State ex rel. Newgass* v. *Judge of the Superior District Court, Parish of Orleans*, 672.

SEE BONDS, No. 10—*State ex rel. Citizens' Bank of Louisiana* v. *Board of Liquidators*, 660.

SEE TAXES AND TAX COLLECTORS, No. 13—*State ex rel. Norcross* v. *Judge of the Fourth District Court, Parish of Orleans*, 704.

MARRIED WOMEN.

1. The defendant, a married woman to the knowledge of the broker who negotiated the lease on which she is sued, being without authority to make the contract or to stand in judgment, and not being shown to be pursuing a separate business for herself, the plaintiff can not recover.

Widow Stewart v. *V. M. Killmartin and J. B. Davis*, 456.

MARKETS.

1. It does not follow because the city has leased the markets for the year 1874 that it loses all interest in the management of them and in seeing that the laws and regulations concerning them are carried into effect. The act of 1874 makes it the duty of the city, through its administrators, to take measures for carrying out the provisions of the act regulating private markets, and in any issue that may arise in acting under this authority the city would be competent to stand in judgment.

The Legislature had the power to make the regulation which it has made by the act of the twenty-sixth February, 1874, declaring that private markets shall not be established, continued, or kept open within twelve squares of a public market. This power arises from the nature of things, and is what is termed a police power. It springs from the great principle "*salus populi suprema est lex.*" There is in the defendant's case no room for any well-grounded complaint of the violation of a vested right, for if he really possessed the privilege of keeping a private market, that privilege was acquired subordinately to the right existing in the sovereign to exercise the police power in regulating the peace and good order of the city, and in providing for and maintaining its cleanliness and salubrity. The act of 1874 is not unconstitutional.

The act of the twenty-sixth February, 1874, is not in violation of article 114 of the State constitution. The act has but one object;

MARKETS—Continued.

that one object is expressed in the title. The words "and for other purposes," are in the title to this act meaningless, for there is nothing else treated of in it besides the regulation of private markets.

The act of 1874 abolishes all private markets located within less than twelve squares of a public market. To that extent it repeals the act of 1866, under which the defendant sets up its title.

City of New Orleans et als. v. *James Stafford*, 417.

2. For carrying on a private market in contravention of the ordinances of the city of Shreveport, the defendants may be responsible to said city on account thereof. But plaintiffs, who are lessees of the public markets, have no right to sue to enforce the ordinances of that political corporation, nor can the validity of said ordinances be tested in this controversy to which the city of Shreveport is not a party.

Benjamin Jacobs et al. v. *Benjamin Levy et al.*, 619.

3. In order to present the question whether the mayor of the city of Shreveport had authority to arrest and fine the plaintiffs in this instance but defendants in certain cases in which they were sued for carrying on a private market in contravention of the ordinances of said city, and the question being whether said ordinances are legal, the defendants should have appealed from the judgments imposing the penalty in said ordinances prescribed. They can not test the authority of the mayor to enforce the ordinances of the city prohibiting private markets, and the legality of said ordinances, in a proceeding of this kind, to wit: by injunction and a claim of damages.

Benjamin Levy & Co. v. *City of Shreveport et al*, 620.

METROPOLITAN POLICE DISTRICT.

See Taxes and Tax Collectors, No. 11—*H. Gally* v. *Leopold Guichard*, 396.

METROPOLITAN POLICE WARRANTS.

1. The plaintiff, as a creditor and a taxpayer has no right to interfere in the administration of the municipal corporation of New Orleans, or to invoke the aid of the court to compel the city to collect license in money and not in Metropolitan Police warrants, as required by law. He has no direct pecuniary interest in the question raised. Hence, on this ground, the intervenors, holders of said warrants, who are the real parties whose rights are at issue, can object to this litigation and to the application of plaintiff for an injunction against the city. They have good cause to oppose the issuance of a proceeding prejudicial to them, at the instance of a party without interest to demand it. As the interests of the

METROPOLITAN POLICE WARRANTS—Continued.

city were not affected, she set up no serious defense, and it looks as if the judgment as to her was a mere consent judgment. The real controversy was with the intervenors.

Louisiana National Bank v. *City of New Orleans et als.*, 446.

2. In precise terms, act No. 33 of the acts of 1874 makes Metropolitan Police warrants receivable for licenses throughout the Metropolitan Police district, and the relator in this instance clearly has the right to pay his license to the city of New Orleans in the warrants tendered by him.

In this statute there is no longer any limitation, as before, upon the receivability of Metropolitan warrants for licenses throughout the Metropolitan Police district, and the court can not decide that there is a limitation where the law has imposed none.

That New Orleans received in settlement of taxes and licenses due her prior to the enactment of the statute of 1874 more than the aggregate amount of her apportionment, is immaterial to the issue in this case. If she received more than the law required her to receive and suffers an inconvenience on account thereof, it is the result of her voluntary act.

Like every other holder of Metropolitan Police warrants, she can present the excess beyond the *pro rata* apportioned to her to the Metropolitan Police Commissioners for payment out of the money collected from the other cities, towns and parishes composing the Metropolitan Police district.

There is no force in the objection that the Louisiana National Bank has enjoined the city and the respondent from receiving Metropolitan Police warrants for licenses, because that was virtually a consent judgment, and the rule is, such judgments are binding only on the parties.

State ex rel. Edward Lubie v. *Administrator of Finance, City of New Orleans*, 493.

MORTGAGE.

1. Nathaniel Montross, of New York, took out an order of seizure and sale against certain property mortgaged to him by Samuel Jamison to secure the payment of promissory notes on which this suit was brought. The mortgaged property was sold and adjudicated to plaintiffs. The amount due on the debt for which the property was seized was paid, and the remainder of the proceeds of the sale was retained to pay prior incumbrances. The city of New Orleans claimed as due for unpaid taxes against the property a certain sum of money with interest and costs and attorney's fees, and alleged the city's right to be paid in preference to any other creditors. The State tax collector for the First District of New

MORTGAGE—Continued.

Orleans excepted to the jurisdiction of the court, showed that the State has a first privilege upon the property for all taxes, and can not be called in as an ordinary creditor as aimed at by plaintiffs.

But Smith & Co., who held certain mortgage notes, drawn by Jamison and secured also by first mortgage, took executory proceedings against the said property which plaintiffs have enjoined. They have made parties to this suit as in a kind of *concursus*, the city of New Orleans, claiming a sum due for taxes, also the State tax collector of the First District of New Orleans, and Nathaniel Montross, holder of the notes and mortgage under which the property was sold, and they have prayed that the proceeds of the sale of the property in their hands be distributed among the creditors of Jamison, according to their respective rights of mortgage and privilege.

The court *a qua* maintained the exception of the State tax collector, gave judgment in favor of the city for a certain amount of taxes, with lien and privilege on the property, and dissolved plaintiffs' injunction.

The judge below erred only so far as he gave judgment in favor of the city for taxes. It would be in time after the execution of the order of seizure and sale now pending to present the claim for taxes, reserving to the city her right to be paid the taxes due out of the proceeds of the sale when made.

Hibernia National Bank et als. v. *Samuel Smith et als.*, 59.

2. It appears from the mortgage certificate that the judgment of Dudossat, defendant in injunction, creates a judicial mortgage prior in rank to the judicial mortgage of plaintiff in injunction. The preference that Soulie acquired from a prior seizure of Ranson's property can not defeat the existing prior mortgage on the property in question, which seems to be all that remains belonging to the seized debtor. When sold, the property was adjudicated to Soulie, who refused to pay over the money to the sheriff, whereupon the sheriff was proceeding to resell the property when enjoined by Soulie on the ground that he had the right to retain the money in satisfaction of his judgment. This was wrong; Soulie should have complied with his bid; a *concursus* was his remedy. The sheriff was right when proceeding to resell, and the injunction was wrongfully taken.

Lehman, Newgass & Co., A. Dudossat, subrogated, v. *Louis Ranson—On Injunction of Bernard Soulie*, 279.

3. The property of a cotutor is not subjected to the legal mortgage of the minor. But by the term cotutor must be understood the person who becomes so by the fulfillment of the requirements of law.

MORTGAGE—Continued.

Where the mother, being the natural tutrix of her minor children, contracts a second marriage, she is required, previous to the marriage, to cause a family meeting to be convened for the purpose of determining whether she shall remain tutrix after the marriage. If she fails in this duty she loses the tutorship *ipso facto*. In such a case, the children of a previous marriage have a legal mortgage on the property of the new husband for the acts of the tutorship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place.

W. Bodein Keene v. *George Guier and Sheriff*, 232.

4. The obligations sued upon were entered into subsequent to the homestead law, and are therefore subject to it. These obligations novated a debt previously existing and secured by mortgage. Whether this original mortgage was valid or not for want of reinscription is immaterial. It was abandoned and became inoperative by the consent of the original mortgagee, who received in lieu thereof the new obligations which are now sought to be enforced.

Robert J. Moore v. *A. J. Beelman — Same* v. *Mrs. Laura J. Beelman—Consolidated*, 276.

5. Where there is a total want of description of the situation of the thing mortgaged, the act of mortgage is invalid.

Keiffer Bros. et als. v. *Isaac Starn et als.*, 282.

6. The only important question in this case is, could a judicial mortgage, resulting from the recordation of a judgment against the vendee, attach to the property sold, to the prejudice of the vendor's privilege and mortgage to secure the price, in consequence of the delay in recording the mortgage? The answer is negative. The mortgage and privilege were recorded in the parish of St. James, where the property is situated, simultaneously with the act of conveyance. As to third persons, the sale had no effect until it was duly recorded where the property is situated. It is certain that the creditors of the vendor might have seized and sold the property before the registry of the sale in St. James parish, free from any claim of the vendee's creditors, but if their judicial mortgage had attached as soon as the sale had been made this could not be.

Eugene Rochereau & Co. in Liquidation v. *H. Octave Colomb*, 337.

7. Whether, in this instance, the tutrix was indebted or not to her minor children, is a matter of indifference, inasmuch as their mortgage was not recorded, as required, by the first of January, 1870, but only on the ninth of May of said year.

John S. and Louise Skinner v. *William C. Sibley*, 392.

8. The plaintiff's claim is the result of a judgment which she obtained

MORTGAGE—Continued.

against her father, which judgment gives to her a legal mortgage over all his immovable property, dating from the third of May, 1852. This judgment was inscribed on the sixteenth of April, 1868.

A judgment which recognizes a minor's claim and mortgage, and which is duly recorded prior to the year 1870, does not come under the 123d article of the constitution which declares "that tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, 1870, unless duly recorded," and the act No. 95 of the Legislature of 1869, which provides for carrying out the provisions of the aforesaid article of the constitution.

When the article 123 of the constitution was adopted, the plaintiff's rights were perfect. She had a tacit mortgage upon her father's property, and the evidence was a duly-recorded judgment of a competent court. There was no necessity for her to record it again. The article did not refer to her; she had complied with its requisites.

The rendering and signing of the plaintiff's judgment against her tutor, out of term time, did not, under the circumstances of the case, make it a nullity. It was agreed between the parties that the judge who tried the case should take it under advisement, render judgment, and sign it after the court should have adjourned. The parties were competent to make the agreement, and the judgment having been rendered in conformity to it is good.

The judgment of separation of property and dissolution of the community in a suit instituted by plaintiff's mother against her father, having never been executed or sought to be executed, was nothing, and did not affect the community.

The proceedings in which the plaintiff's father obtained leave of the court to give a special mortgage in lieu of the tacit one existing in favor of the minor, did not become final, because the mortgage after it was executed was not approved by the judge, and because it was not recorded in the parish where the property mortgaged was situated until after this suit was instituted, some ten years after the mortgage was given.

The vendor's privilege has no priority in this case over the plaintiff's tacit mortgage. The mere filing of the act of sale, which was passed in New Orleans, and the recording of it among the notarial acts of his office by the recorder of the parish of Pointe Coupee, was not the recording required by law in order to give it effect as a mortgage, or to preserve the privilege which it carried with it. Although subsequently recorded in the proper books of the recorder of mortgages, it was done within the time required to keep

MORTGAGE—Continued.

in existence the vendor's privilege, but operated only as a mortgage from the time it was recorded.

Plaintiff's tacit mortgage attached to the property purchased by her father from the day he purchased. The vendor's privilege was superior to the tacit mortgage so long as the privilege existed; but when the privilege ceased to exist, then the tacit mortgage was in force against it, and it had its effect without being recorded. When therefore the act of sale was recorded, it operated as a mortgage from that date, but at that time the property was burdened with the plaintiff's tacit mortgage, and the conventional mortgage was second to it in rank.

Mathilde Morrison v. *Citizens' Bank of Louisiana and Sam Smith & Co.*, 401.

9. A judgment is not completed and can not operate as a judicial mortgage or have any effect until it is signed. It is the recording of a judgment that gives a judicial mortgage, and until a final judgment is signed it is no judgment.

Widow Elizabeth Marchal v. *Harriet Hooker et als.*, 454.

10. On sixth February, 1857, Mrs. Pickett conveyed to Cummings the usufruct for life of the Chalk Level plantation by act under private signature. On twentieth November, 1865, Cummings mortgaged to Mrs. Pickett the Chalk Level plantation, A. H. Leonard accepting the mortgage as agent of Mrs. Pickett, who thereby, it is alleged, as well as those who might claim under her, was estopped from denying Cummings' title to said plantation, because she had accepted a mortgage from him and thus tacitly acknowledged him as owner thereof. On the twenty-fourth of November, 1866, Alter recorded a judgment which he had obtained against Cummings in the parish of Bossier. On third July, 1866, Mrs. Pickett mortgaged the Chalk Level plantation to Lee to secure ten notes for $10,000 each.

On the second September, 1866, Mrs. Pickett, by act under private signature, renounced in favor of Lee the priority of her mortgage acquired from Cummings.

On the seventh of December, 1872, the Chalk Level plantation being sold at the suit of Lee and purchased by the Union Bank, the proceeds of this sale are now the subject of this controversy.

Prior to the sale, the Citizens' Bank, the Union Bank, and Mary B. Conner had filed their opposition, alleging that they held notes secured in the same mortgage from Mrs. Pickett to Lee, which said notes Lee had indorsed to them, and therefore they were entitled to be paid by preference over Lee out of the proceeds of the

MORTGAGE—Continued.

sale of the mortgaged property. Alter also filed a third opposition setting up his mortgage rights.

The inquiry is limited to the validity and extent of Alter's rights as against plaintiff and the opponents, the Citizens' Bank, the Union Bank, and Mary B. Conner, in relation to the proceeds of the sale. Cummings had no title from Mrs. Pickett which had effect as to third persons, because none was recorded in the book of conveyances in the recorder's office of the parish of Bossier. It was not disclosed to the public when the mortgage of Mrs. Pickett to Lee was granted, and there is no evidence that it has ever been disclosed by registry in the parish of Bossier where the Chalk Level plantation is situated. The registry in the mortgage book would be good for a mortgage, but would be no registry for a title. Therefore the mortgage granted by Mrs. Pickett on the second of July, 1866, to Lee on the Chalk Level plantation, the title of which stood on the public records in her name, is not defeated by the judicial mortgage of Alter against Cummings.

As mortgagee of the usufruct which Mrs. Pickett attempted to create in favor of Cummings, Alter is equally unfortunate. The registry of his judgment against Cummings did not give him a mortgage on the right of usufruct of the Chalk Level plantation. The act granting it is an act under private signature, and therefore invalid as a donation. It is not good as a sale or a giving in payment, as there was no price stated in the act.

If, however, Cummings had the right of usufruct, and Alter, by the registry of his judgment against him, had acquired a mortgage thereon, Alter should have asked a separate appraisement prior to the sale, in order that his part of the proceeds should be ascertained with legal certainty.

Thomas B. Lee v. *R. C. Cummings and Paulina Pickett. Charles E. Alter et als., Intervenors*, 529.

11. The peculiar principles upon which the Consolidated Association of the Planters of Louisiana was organized, the important purposes it was intended to subserve, and the enduring character which was required to be given to it, rendered essentially necessary that the enforcement of its obligations should not be defeated or delayed by pleas and defenses admissible in regard to ordinary hypothecations. The important interests of the State were also to be protected.

It is a pre-eminent feature in the charter of the Consolidated Association of the Planters of Louisiana that no future change of ownership or possession of the property mortgaged to secure the stock subscribed or the loan made should ever prevent or delay

MORTGAGE—Continued.

the enforcement of the mortgage against the property, to collect whatever sum might be due by the original mortgager. It was on these conditions that the State became the indorser on the bonds issued by this association in 1828. There is no place for delays or calls in warranty, nor operation of prescription of its debts, or peremption of its mortgages.

Reference must be made in this instance to Civil Code, article 3333, amended by act of 1842, which declares "that the rule requiring the reinscription of mortgages at the expiration of ten years from date of their registry shall not apply to the mortgages which have been or may be given by the stockholders of the various property banks of this State."

The Consolidated Association of the Planters of Louisiana v. *John W. Mason et als.*, 535.

12. It has often been held that a defendant appearing to except to the citation can not at the same time urge any matter of defense.

The court *a qua* did not err in rejecting the document offered by defendant to show that the plaintiff was a bankrupt, and therefore not entitled to enforce certain judgments on which his suit is based, because the instrument was from the United States District Court of another State, and was not authenticated according to the act of Congress.

The defendant was without interest to contest with plaintiff when he set up that the entries of his lands, against which the hypothecary action of the plaintiff is instituted, had been canceled, and said lands belonged to the United States. This defense puts him out of court.

The defendant's discharge in bankruptcy relieved him from personal liability, but it did not remove the mortgage which plaintiff had previously acquired on the lands. When the defendant, subsequent to his discharge, bought the lands which he had surrendered subject to the liens existing thereon, they remained liable to the hypothecary action which plaintiff has brought against them.

S. S. Heard v. *B. P. Patton*, 542.

13. After a wife has obtained a separation of property from her husband, and has executed it, and has assumed the administration of her estate, it would be a fraud upon the public to permit her to acquire a legal mortgage upon the property of the husband, acquired by him subsequent to the judgment of separation, by allowing him to manage her property and spend her money. He must be presumed to have acted as her agent, and as such he owes her an account of his administration, but his acts create no mortgage on his estate.

MORTGAGE—Continued.

Mrs. Gayle, the administratrix, having occupied a house which was the separate property of her husband, and which belonged to his succession, must be charged with the rent as any third person would be.

Neither by separate nor combined action can the administratrix and attorney of the succession impose an onerous charge upon an estate by the employment of counsel, when the estate is already provided with a competent legal adviser. If the administratrix chooses to employ additional counsel, she must pay him out of her own funds.

In matters of opposition to succession accounts all the parties are plaintiffs and defendants, and each opponent must make out his case by proper and sufficient proof.

The reinscription of a mortgage after the peremption, subsequent to the death of the mortgager, does not affect the property of the succession with a mortgage.

The opposition to the failure of the administratrix to the account for amount of notes given for the purchase of property sold on the Stevens plantation must be maintained. The proposition that the balance due Mrs. Stevens for rent exceeds the amount of these notes is inadmissible. The notes were given for property belonging to the succession. It was the duty of the administratrix to collect them, and to place the proceeds on her account, leaving it to the parties in interest to claim their right of preference over the proceeds. *Succession of Gayle*, 547.

14. After a mortgage has once perempted it can not be revived against a succession by the registry thereof after the lapse of ten years. No preference over ordinary creditors of a succession can be gained in that way.

Martha J. Sorrels and Husband v. *James M. Stamper*, 630.

15. Powell effected a four months' loan with the New Orleans Banking Association, and gave as collateral security four notes, with mortgage on his property. On the maturity of the four months' loan, Powell, not having money to pay said loan, applied to Low & Ludwigson for a loan to pay the bank, which was furnished on condition that the twelve months' notes pledged to the New Orleans Banking Association should be delivered to them as collaterals. Powell's debt to the bank was paid with the money thus borrowed and the collaterals were delivered by the bank to Ludwigson, who pledged them to the Mechanics' and Traders' Bank, plaintiff in this suit, for a debt of Low & Ludwigson.

After the transaction aforesaid the mortgage rights of the third opponents arose. This court thinks that the third opponents er-

MORTGAGE—Continued.

roneously contend that the payment by Powell of the four months' loan extinguished the mortgage given to secure the twelve months' notes, now in suit. Practically, the original debt to one creditor was extinguished by the substitution of another creditor, upon the express condition that the security should be continued as it then existed. It was clearly not the purpose or intention of Powell to extinguish the mortgage, and the manner in which the evidence thereof was delivered to the new creditor did not have that effect.

Mechanics' and Traders' Bank v. *Jesse R. Powell. James E. Zunts and Samuel R. Bertron, Third Opponents*, 647.

16. The question in this instance is whether certain articles found on a mortgaged tract of land, seized and sold by plaintiff and adjudicated to him as part of the mortgaged property, were covered by said mortgage, and in that case whether they could be afterward seized, advertised and sold by defendant individually and as testamentary executor of the late William Bobb. The decision of this court is in favor of the plaintiff, on the grounds that the objects now in litigation were found on the premises seized; that they were used in carrying out the industry to which the real estate was subjected, and therefore that said property in dispute was properly seized, advertised, appraised and sold as subject to the mortgage of the plaintiff, to whom it was adjudicated on the sale thereof.

Albin Rochereau v. *Charles P. Bobb, Individually and as Testamentary Executor, et al.*, 657.

See Privilege, No. 6—*Bank of America* v. *Fortier*, 243.

See Judgment, No. 7—*Alexander Lirette* v. *John Carrane*, 298.

See Dation en Paiement, No. 1—*E. Newman & Co.* v. *John Eaton and Wife*, 341.

See Bills and Promissory Notes, No. 14—*Gardner* v. *Maxwell*, 561.

See Lessor and Lessee, No. 5—*Case* v. *Kloppenburgh*, 628.

NATURAL CHILDREN.

1. A suit against an administrator of an estate for alimony by natural children can not be maintained.

Ann Dalton, for the Use of, etc., v. *Succession of Patrick Halpin*, 382.

OBLIGATIONS AND LIABILITIES.

1. Where one of two innocent persons must suffer a loss through the misconduct of another, the loss ought rather to fall upon him who put it in the power of the third party to inflict the injury.

Mahan v. *Dubuclet, State Treasurer*, 45.

OBLIGATIONS AND LIABILITIES—Continued.

2. This is a suit to recover the amount of losses sustained in consequence of incorrect information given by defendants, in violation of their contract with plaintiffs, as to the fluctuations of the gold market in New York. The defense is, that the error in the telegram was no fault of defendants, but occurred in the working of the indicator of the Gold Stock Company placed for convenience in the office of defendants in New York, but under the management of a corporation entirely distinct from theirs. This does not exonerate them from liability, because by their contract they were bound to carry to plaintiffs correct information, which they could have obtained without relying on the indicator.

Bank of New Orleans v. *Western Union Telegraph Company*, 49.

3. Plaintiff was the owner of the property on which he made certain improvements, repairs, etc., for the reimbursement of the value of which he now sues. It is true that this ownership existed only during the lifetime of John Slidell, from whom it had been taken by forfeiture and confiscation. Still, during that time, it was absolute.

Besides, most of the improvements were made after the suit by the Slidell heirs was brought against him. This would deprive him of his right to recover the value of the improvements. If the suit between them was a question of title, as soon as the suit was instituted he could no longer set up possession in good faith.

Joseph Brugere v. *The Heirs of John Slidell*, 70.

4. The plaintiff sues defendant for a certain sum of money on a contract of affreightment concerning the transportation of staves, for which he signed a bill of lading. After signing, he protested against it. This was too late. If his allegations are true, he should not have signed the bill of lading, or if he did, he should have protested at the time.

James S. Rogers v. *Robert Roberts*, 85.

5. The rule seems to be generally adopted and sanctioned, that in order to render the carrier liable for losses of baggage or goods shipped as freight, they must be delivered and entrusted to the carrier; and in regard to baggage the liability of the carrier does not extend beyond the value of reasonable articles of apparel or convenience according to the passenger's condition in life and the journey undertaken by him, and for such sum as might be deemed necessary for his expenses.

Mrs. Ellen Yznaga Del Valle and Husband v. *Steamboat Richmond and Owners*, 90.

6. This is a suit on a mortgage note drawn by defendant, and lost *in transitu* from New York to New Orleans, to which latter place it

OBLIGATIONS AND LIABILITIES—Continued.

had been sent for collection. The Citizens' Bank of Louisiana offered him a bond of indemnity if he would pay the note at maturity, which he declined. Under this statement of facts;

Held—That the defendant is liable for the interest due on the note from the maturity thereof, for counsel's fees, and for the costs of the act of mortgage. He could have avoided them all by depositing or tendering a deposit of the amount of the note when it fell due, and thus putting the plaintiff in default. But he is not liable for the costs of advertisement for the recovery of the lost note, as he can not be made to pay for either the misfortune or the negligence of plaintiff.

Citizens' Bank of Louisiana, for the Use of the Phenix National Bank of New York, v. *John Baltz*, 106.

7. The Teutonia National Bank was clearly without right to hold Loeb & Co.'s note, pledged to secure a particular debt of Gretzner, Winehill & Co., on account of any other indebtedness of that firm to the bank. When Loeb & Co., and also Gretzner, Winehill & Co., with them, offered to pay and take up the note of the last-named parties the bank upon receiving payment in full for that note should have surrendered the collateral.

Teutonia National Bank of New Orleans v. *H. Loeb & Co.*, 110.

8. The proprietor of a building leased to a tenant is not liable in damages to third parties resulting from the use to which the tenant may put the leased property, unless it be shown that, at the time the lease was made, he knew the uses and purposes the tenant would apply it to, and that such use, from the nature of the business, would prove a nuisance.

Michael Muller v. *H. L. Stone and Willoz & Rostand. Mary Catherine and William Muller, Intervenors*, 123.

9. The city is not responsible for the damages which may result to one of its officers when in the discharge of his duty. It is a risk which he runs when he accepts the position.

Spalding v. *City of Jefferson, and Purdon* v. *The City of New Orleans et als.—Consolidated*, 159.

10. In this case the act of the officers of the city and the men in their employ being a trespass upon the plaintiff's property, for this the law holds the corporation liable. A judgment in favor of the city of New Orleans, like other judgments, could only be executed by the proper officers of the law. It was the province of the court to see that its orders were obeyed. It was no part of the mayor's duty to enforce its decree.

The Pontchartrain Railroad Company v. *The City of New Orleans*, 162.

OBLIGATIONS AND LIABILITIES—Continued.

11. This is a suit to recover the penalties stipulated in two charter parties, for the violation thereof, in relation to voyages *to* be made by two different vessels.

The putting in default was sufficient as to one of the vessels, but there is no proof that either of the modes for putting in default pointed out in article 1911, R. C. C. No. 2, was observed in relation to the other vessel, until the day the contract expired, when it was impossible for the vessel to execute her voyage on, or previous to, that day. The defendants are therefore liable jointly and *in solido*, as they bound themselves, only for the infraction of the contract as to one of the vessels. *Henry Eden* v. *F. Lemandre et als.*, 176.

12. Plaintiff claims a certain amount of money alleged to have been loaned to defendant. The conduct of plaintiff, under the circumstances of the case, is such as not to leave it free from the suspicion that it was regulated so as to insure, under the guise of a loan, the payment of the losses of defendant in a gambling-house kept by plaintiff, when the payment of said losses could not directly be enforced on account of immoral consideration and from the violation by the parties of a prohibitory law. Courts of justice are not open to litigation of this kind.

H. J. Sampson v. *Norman Whitney*, 294.

13. It is in evidence that the Louisiana Levee Company, defendant in this case, made no contract with plaintiffs, the executors of Elder, but that said executors finished the work for which Elder had contracted, and that the balance due by the company was the amount for which the company confessed judgment. It is immaterial whether the succession of Elder was insolvent or not, as far as the responsibility of the Levee Company, under its contract, is concerned. When the company pays the whole price for which it was bound, for the work, whether the price was paid to Elder or to his executors, it is discharged from all further responsibility.

White and Tompkins, Executors, v. *Louisiana Levee Company*, 295.

14. This is a suit personally against a tutrix, one of the defendants, on six mortgage promissory notes given by her, and also as representing those of her children who were minors when the suit was brought, and the majors who joined in the act of mortgage, for the amount of the notes sued on, and for a decree of lien and privilege on the property mortgaged. The defendant, one of the heirs, a minor when judgment was rendered, but now of age, appeals from said judgment.

The motion to dismiss defendant's appeal on the ground that all his joint obligors have not been cited and made parties to the appeal, can not prevail. He is not a joint obligor: his liability is as heir

OBLIGATIONS AND LIABILITIES—Continued.

to his father, and his liability is fixed by his interest in his father's succession.

When the father of the appellant died, he was largely in debt. The representative of his succession, in order to pay off his indebtedness, was authorized by the judge, on the recommendation of a family meeting, to borrow a sufficient sum to discharge this indebtedness. Hence the notes now sued on. This was not the creation of a debt; it was the acknowledgment of one and providing means to pay it—all of which was done in the interest of the heirs. The appellant's liability, therefore, is fixed by his interest in his father's succession. To the extent of that interest the judgment binds him, but to nothing more.

Vernon K. Stevenson v. *Lavina Edwards et al.*, 302.

15. At the time of the discount of the note which is the subject of the present controversy, Hunter, one of the firm of Callender & Hunter, according to the import of his own evidence, was utterly without authority to do so. He had no right to indorse and discount a note belonging to Callender, the plaintiff, and payable to his order, it matters not how much Callender might owe the late firm of Hunter & Callender. If Callender had given him verbal authority, as contended by defendants and intervenors, the authority was revoked before exercised. But, even without a revocation, Hunter had no authority to indorse and discount the note in question.

Authority to indorse and discount a note for one purpose can not be extended to another.

As Hunter had no title to the note, his indorsees acquired none, because they had notice of the want of authority in Hunter to indorse and negotiate it.

R. K. Callender v. *Golsan Brothers. Jackson & Manson, Warrantors and Intervenors*, 311.

16. The amount due for unpaid stock must be paid. It is no defense to allege that the penalty for not paying said amount is the forfeiture of the stock.

New Orleans, Florida and Havana Steamship Company v. *E. B. Briggs*, 318.

17. From the evidence in this case, the relations of the two defendants in warranty toward the plaintiff must be regarded as being something more than those of brokers. Their functions and obligations did not cease upon merely bringing together the parties that were to contract and leaving them to arrange their business as they saw best. They must be regarded in the light of mandatories and as having assumed themselves this character, in consequence of which they were bound to use the same diligence and

OBLIGATIONS AND LIABILITIES—Continued.

precaution to prevent fraud being practiced upon the plaintiff that a prudent man would use in regard to his own affairs. Their not having done so, makes them responsible for the consequences of the fraud, which they could have detected and defeated by ordinary diligence.

Mrs. Jane H. H. Todd v. *John Bourke. Van Solingen & Carpenter, called in warranty*, 385.

18. He who sells a credit or incorporeal right warrants its existence at the time of the transfer. The seller does not warrant the solvency of the debtor, unless he has agreed to do so. There is no lesion in such sales, and no relief can be granted.

Milton Benner v. *Warner Van Norden et al.*, 473.

19. Creditors may become parties to an assignment in other ways than by actually signing the instrument, as by coming in under it for the purpose of obtaining a dividend. In this instance the plaintiffs were informed of the terms and conditions on which the defendants had assigned their property to their creditors, and they accepted their *pro rata* from the assignee without reservation, and thereby made themselves parties to the agreement. They ought not to be permitted to enjoy the benefit of a compromise, and at the same time repudiate all its obligations.

Wallace & Co. v. *Cumming & Morrison*, 631.

See Damages, No. 1—*Johnson* v. *Canal and Claiborne Streets Railroad Company*, 53; and No. 9—*LeBreton* v. *Kennedy*, 432.

See Surety, No. 1—*Culver, Simonds & Co.* v. *Leovy, Hart & Co.*, 58.

See Attachment, No. 2—*Block, Britton & Co.* v. *Barton, Miller & Co.*, 89; and No. 5—*Joseph Moore* v. *Sallie Pope and Husband*, 254.

See Partnership, No. 6—*Wild* v. *Erath*, 171.

See Privy, No. 1—*Martin Kenopski* v. *Mark Davis et al.*, 174.

See Contract, No. 2—*Payne & Harrison* v. *Mrs. Stackhouse*, 185.

See Succession, No. 1—*Hunt* v. *Graves*, 195.

See Bills and Promissory Notes, No. 9—*Gay & Co.* v. *Deynoodt et al.*, 249; and No. 16—*Fuller* v. *Leonard*, 635.

See Assumpsit, No. 1—*Lapene & Ferre* v. *Delaporte*, 252.

See Factors, No. 1—*Banning* v. *Blakely & Co.*, 257.

See Checks on Banks, No. 1—*Mrs. Burke* v. *Mrs. Bishop et al.*, 465.

See Vicksburg, Shreveport and Texas Railroad Company, No. 1—*Chaffe Bros.* v. *John T. Ludeling et als.*, 607.

See Corporations, No. 3—*State ex rel. Haven* v. *City of Shreveport*, 623.

See Offices and Officers, No. 11—*Levisee* v. *Shreveport City Railroad Company*, 641.

See Pleadings, No. 5—*Spears, Liquidator*, v. *Spears, Administratrix*, 642.

See Laches, No. 1—*Bogart Shall et al.* v. *Foley et al.*, 651.

OFFICES AND OFFICERS.

1. The State ex rel. Elias George instituted suit against Tucker, under the intrusion act, to recover the officer of recorder of the parish of Tangipahoa. While that suit was pending George sued Tucker and enjoined him from recovering the fees of the office. The injunction was set aside on Tucker giving a release bond with sureties. There was judgment against Tucker for the fees, George having been declared entitled to the office in the suit of the State *v.* Tucker. The plea set up by Taylor, surety on the release bond, that George could not sue for his fees of office without the interposition of the Attorney General or district attorney in his behalf, can not be maintained.

The State having instituted procedings to oust the intruder from the office and to install George therein, there is no good reason why George should not have taken all necessary steps to preserve his rights to the fees of the office to which he had the legal title. The State was interested in seeing that no one should intrude into a public office, but it had no interest in the fees of the office.

Elias George v. *A. G. Tucker and B. F. Taylor*, 67.

2. It can not be doubted that the intention of the law is that the city attorney must be elected biennially by the council. It is also clearly stated in the city charter that his term of office is two years.

Under the law the council can only elect a city attorney on the third Monday of November, or as soon thereafter as practicable, and unless the term expires biennially at that time this duty could not be performed by said council.

The term of office of the mayor and administrators began on the first Monday of November, 1870, and continued for two years. That of the city attorney, the surveyor, and the recorders began on the third Monday of November, at which time the law required these offices to be filled by an election for two years.

With a view to give effect, if possible, to every part of the law, it must be concluded that the government established when the city charter went into operation in April, 1870, was a temporary organization, and that the permanent government began after the election of the mayor and administrators on the first Monday of November, 1870.

Under this construction full effect can be given to that provision of the charter making it the duty of the council to elect a city attorney at the first regular meeting after its induction into office. This could not be done if the term of the city attorney began with the temporary organization in April, 1870, and continued for two years. The law clearly contemplated a vacancy and the beginning

OFFICES AND OFFICERS—Continued.

of a new term at the time required for the election. Otherwise, that election which was imposed as a duty on the city council could not have been performed—which would have been an absurdity. Hence it follows that the election of defendant by the council, as city attorney, on the fifth of December, 1874, was valid.

State ex rel. Attorney General et als. v. *B. F. Jonas*, 179.

3. In this controversy for the office of coroner, under section 1419 of the Revised Statutes, the exception that the suit was not brought within ten days after the election must prevail.

James Madison v. *James Dyer*, 305.

4. Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within that delay, or the action, if excepted to, will be dismissed. In this instance the suit should have been brought *within ten days after the election.* The court below erred in not maintaining the exception of the defendant on that ground. The law is not ambiguous, and no room is left to the discretion or equity powers of this court; it must, therefore, be administered as it is, however unwise some of its provisions must appear.

J. L. Belden v. *Thomas P. Sherburne*, 305.

5. It is not to be discovered in the record nor is it possible to imagine what office O. J. Flagg held that constituted him "*ex-officio committing magistrate*," and that entitled him to draw a salary from the parish of St. Charles. If as district judge he discharged the duty of a committing magistrate, he was clearly entitled to no compensation from the parish, because the salary paid by the State is all that he can rightfully receive.

Letitia Babbington v. *The Parish of St. Charles*, 321.

6. Act No. 92 of the acts of 1869, under which Dr. Cooper claims title as police surgeon of the Metropolitan force, fixes the term of the office, in the ninth section thereof, as being during good behavior. Act No. 60 of the acts of 1874 in no manner proposes to amend act No. 92, so as to change the term of office. The act of 1869 remains in force, with this limitation, however, resulting from act No. 60, that the police commissioners, in reducing the police force, may "honorably discharge such members as in their judgment may seem needful." Thus, under this amendment they could have discharged Dr. Cooper, but they had no warrant to remove him as they did, merely to appoint Dr. Schumaker. Power granted for one purpose can not be employed for another.

State of Louisiana ex rel. Attorney General on Information of Dr. J. B. Cooper v. *Dr F. Schumaker et al.*, 332.

OFFICES AND OFFICERS—Continued.

7. The judgment of the court in this case is based entirely on the one already rendered in the case of Claiborne *v.* Parlange, the facts being substantially the same. 26 An. 548.

The State ex rel. J. C. Beale v. *Isaac H. Crawford*, 439.

8. This suit originates in a claim against the city of New Orleans for salary and fees of office as clerk of the Superior Criminal Court, in alleged conformity with the second section of the act of 1874, establishing said court and providing for the clerk thereof. The act says that for issuing any process, the fee whereof is not determined by law, the judge of the court shall fix the compensation to which the clerk is entitled, in addition to his regular salary.

Process is so denominated, because it proceeds, or issues forth in order to bring the defendant into court to answer the charge preferred against him, and signifies the writ or judicial means by which he is brought to answer.

Motions made by the Attorney General, copies of indictments, etc., are not process. These are services, which seem to be paid for by the fixed salary of five thousand dollars allowed by the act.

The judge of the Superior Criminal Court has no power to certify the costs of any thing but process for which no provision has been made in the statute. The charges in this case were not for the issuing of any process. The judge, therefore, under the statute, had no power by his certificate of their correctness to make them a liability of the city, and his approval was binding upon no one.

John Fitzpatrick v. *The City of New Orleans*, 457.

9. M. A. Sweet was returned as elected recorder by the board created by law to ascertain that fact, and the commission issued by the Acting Governor is conclusive of that fact in all cases except where the election has been contested within the time fixed by law. Therefore the subsequent appointment of Jackson by the Governor was made in error, and is null and void.

Whether the oath of office of Sweet was taken and recorded in the office of the Secretary of State or not did not authorize the Governor to treat the office as vacant.

The State ex rel. J. E. Leonard, District Attorney, et al. v. *Ed. Jackson*, 541.

10. This is a contest for the office of recorder of the parish of West Feliciana. The vacancy having occurred when the Senate was not in session, the nomination to fill the same was properly made at the called session which was the "next session" after the vacancy occurred. To fill this vacancy the Governor had the power to nominate whom he pleased, and this without regard to any appointment he had made during the recess.

State of Louisiana ex rel. Jacob A. Meyer v. *Joshua Van Tromp*, 569.

OFFICES AND OFFICERS—Continued.

11. When plaintiff undertook to perform for the company a service not strictly within the sphere of his duties as president thereof, he should have required a stipulation for remuneration for said service, if he expected it from the company. He was the president, acting within the scope of his authority in directing the construction of certain works. He had no right, however, to employ himself as a master builder and expect a good salary.

In regard to the expenses for constructing a depot, there was a full settlement between plaintiff and defendant, and if plaintiff's account now presented is valid, it should have been embraced in that settlement, there being no allegation of error.

A. B. Levisee v. *Shreveport City Railroad Company*, 641.

12. This suit is brought under the intrusion act. From all this court is able to gather from this record, the relator has no cause of action. This court does not understand that defendant has usurped or intruded into the office of recorder, or placed it out of the power of relator by any unlawful force or any illegal means to perform the duties of recorder, if legally vested with that power. He claims, as mayor, the right to exercise certain functions which the relator claims as belonging to the office of recorder. It is not seen how the relator can maintain his action as one coming under the provisions of the law for preventing the usurpation of or intrusion into an office.

State ex rel. A. A. Milliken v. *S. J. Ward*, 659.

13. The statute No. 124 of the General Assembly of 1874, conferring on the judge of the Superior Criminal Court the power to appoint an attorney to act in his place, is unconstitutional, because it provides a mode for choosing judges different from that prescribed in the constitution.

It would be obnoxious to an additional objection, if the assumption of the State is correct, that Braughn, the attorney appointed by the judge of the Superior Criminal Court to act in his place, was a *de facto* officer. In that case, the statute would provide for having *two* judges for the Superior Criminal Court, whereas article 83 declares "that for each court, one judge learned in the law, shall be elected."

Instead of authorizing the enactment of section 10 of act No. 124, article 90 of the constitution forbids it in terms of command. It directs the judge when and how he shall select another to preside in his place. Obviously this article did not confer any power upon the General Assembly; but, by indicating precisely how and when the judge shall select another to preside in his stead to try certain causes, it excludes other modes of selection and other causes; and

OFFICES AND OFFICERS—Continued.

as the manner of choosing a judge, provided for in section 10 of act No. 124 differs from that prescribed in article 90, the said section is null and void. *State of Louisiana* v. *Pete Phillips*, 663.

14. The provision of the statute under which Judge Atocha appointed a lawyer, George H. Braughn, to preside in his court and try defendants, being repugnant to article 90 of the constitution, was void from the beginning of its enactment and the appointment was a nullity.

The express requirement of article 90, that the judge shall select a lawyer to try a certain class of cases, carries with it an implied inhibition against the judge selecting or appointing a lawyer to act in his place and stead in the trial of any other cases.

The defendant was therefore tried and sentenced in the Superior Criminal Court during the absence of the judge of that court, and without any competent judge presiding at the time. The attorney who presided had no more authority to act as judge than any other person who was present at the trial.

The position that Braughn was a *de facto* judge and that his official acts were valid, is not tenable. He had no color of title to the office of judge of the Superior Criminal Court, and never claimed or pretended to be judge of that court.

The State of Louisiana v. *George Fritz alias Fry and Frank O'Brian*, 689.

See Compensation, No. 1—*City of New Orleans* v. *Fassman et als.*, 650; and No. 2—*City of New Orleans* v. *Finnerty*, 681.

PARTNERSHIP.

1. The defendant objected to this action on the ground that the petition disclosed a partnership, and between partners only an action for the settlement of the partnership will lie.

The court *a qua* erred in overruling the exception. The record discloses the fact that this demand grows out of a partnership between plaintiff and defendant for carrying freight and passengers for hire on the steamer Ella May. The objection to the form of the action should have been maintained. *Radovich* v. *Frigerio*, 68.

2. This is a suit brought against defendants and various other persons named in the petition, who, as the plaintiff alleges, composed a partnership entered into for the purpose of purchasing and owning the Mississippi Cotton Press and the Branch Press, forming part of the same, which property was bought by Felix J. Forstall, now deceased, but then one of the copartners, acting as the representative of said copartnership and using his name as a firm name to represent the same.

The notarial act by which the plaintiff conveyed title to the prop-

PARTNERSHIP—Continued.

erty shows simply that the plaintiff sold to Felix J. Forstall. There is nothing that shows privity between the plaintiff and these defendants. If between Felix J. Forstall and the defendants there existed an agreement by which the property was to be paid for and owned in common by them, the plaintiff shows nothing authorizing the conclusion that he considered the defendants bound to pay him any thing on this contract. He seems by the terms of the sale to have looked only to Felix J. Forstall, and the mortgage and vendor's privilege upon the property sold. The act of sale contains nothing that warrants the belief that Felix J. Forstall acted as an agent for any person.

Jean B. Letorey v. *Edmond J. Forstall et als.*, 83.

3. The demand in this case being in the alternative, there was therefore no ground for the order to elect. Having forced the plaintiff to elect between a demand for a judgment homologating the award of amicable compounders, which was alleged to be a final liquidation of the partnership, and a demand for a judgment on the notes given to plaintiff for half the alleged value of the property put in the partnership, the defendant could not consistently except to the latter demand on the ground that the notes were a part of the partnership assets, or alleged to be a part thereof, when, in truth, they were not so alleged to be.

Thomas E. M. Smith v. *Patrick Donnelly*, 98.

4. Where a rule was taken to set aside an attachment, on the ground that the suit was based on a partnership transaction, and therefore plaintiff was not entitled to an attachment, for the reason that he could not swear to the amount due, until the rights of the partners should be settled according to law;

Held—That the term partnership implies a community of goods, and a proprietary interest therein, which does not exist in this case. It was a mere consignment of goods, with an understanding that the profits and losses after the sale of the goods should be equally divided between plaintiff and defendants. The objection to the attachment, on the ground alleged, is therefore not well founded.

Where the question was whether the allegations in the petition and in the affidavit were sufficient to warrant the issuing of the writ of attachment, and the plaintiff prayed for judgment for $3500, or such amount as should be found due according to said allegations, and where the affidavit was that "all the facts and allegations in the above and original petition were true and correct, and that the defendants were disposing of their goods, rights and credits, with intent to defraud their creditors;"

Held—That the allegations were sufficient, and that the affidavit was in conformity with law. *Frederick Belden* v. *Read & Hunt*, 103.

PARTNERSHIP—Continued.

5. A bill of exceptions being taken to the admission in evidence of a notarial act, on the ground that the plaintiff had not alleged in his pleadings the assumpsit of the debts of an old firm by a new one, which it was the object of the evidence to establish;

Held—That the evidence was properly admitted. The defendants, by pleading a general denial, put at issue the question of their liability to pay the note sued upon, and the plaintiff had the right, by proper evidence, to show that they were liable.

By the commercial law every member of a commercial firm can bind the others by drawing or indorsing commercial paper. If by an agreement *inter se* a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement. *Henry T. Cottam* v. *George H. Smith & Co.*, 128.

6. In this case the notes given by defendant for the price of a certain piece of property were made the debt of the firm composed of plaintiff and defendant by the act of partnership and purchase, but the notes given by each partner to represent the cash which each agreed to advance as the capital of the partnership were and are the individual debt of each partner, and neither one is responsible for the notes of the other unless he expressly made himself liable therefor. The fact that the interest on such notes was paid by the firm and charged to the maker does not make the notes the debt of the firm, nor would the payment of said notes out of the interest of each partner in the partnership have such effect.

Jacob F. Wild v. *Albert Erath*, 171.

7. During the existence of a commercial partnership service on one of the members is good against all, but after its dissolution any member intended to be sued must be served with a separate citation.

The supplemental answer of Wheless, in which he claims, in reconvention, judgment against Anderson for an amount alleged by him to be due to the firm of Wheless & Pratt, of which firm he asserts himself to be the liquidating partner, does not authorize a judgment on Anderson's original demand against Pratt, who was not cited.

John Anderson v. *J. I. Arnette and Wheless & Pratt*, 237.

8. Defendants, who were members of the late commercial firm of Cornwell & Hays, refuse payment of a note of said firm which was executed to plaintiff, separate in property from her husband, before said separation had taken place. Previous to the existence of the firm of Cornwell & Hays, there existed the firm of L. S. Cornwell & Co., which owed plaintiff borrowed money to the amount of the

PARTNERSHIP—Continued.

note in suit. In liquidation of this debt of L. S. Cornwell & Co., the liquidating partner of that firm gave plaintiff the note sued on, having previously consigned to the factors of said Cornwell & Hays forty-four bales of cotton belonging to said firm of L. S. Cornwell & Co. in liquidation. The proceeds of this cotton, exceeding the amount of the note, passed to the credit of Cornwell & Hays on the books of their factors. Thus, the liquidating partner of L. S. Cornwell & Co., instead of paying over to plaintiff the sum which was due to her, passed that sum, the proceeds of the cotton, to the credit of Cornwell & Hays, and executed to plaintiff the note of the last-named firm, of which he was a partner. Therefore the firm of Cornwell & Hays received a valuable consideration for the note, and plaintiff's claim is established.

It is shown that the money loaned by plaintiff was her paraphernal property. Whether or not the husband was a member of either firm, or both the aforementioned firms, is immaterial.

The plaintiff is not bound by statements made out of her presence by the partners at the partition of the partnership of Cornwell & Hays.

Carrie A. Drake and Husband v. Thomas P. Hays et als, 256.

9. If a debt be contracted by one of the partners of an ordinary partnership who is not authorized, either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction, which is proved in this case.

Lagan & Mackinson v. *George D. Cragin*, 352.

10. The plaintiff in execution against a defendant who is a member of a partnership has the undoubted right to seize and sell under his writ the interest of the owing partner in the partnership property. But his rights stop there. His execution neither dissolves the partnership nor authorizes the appointment of a receiver with power to liquidate the partnership affairs.

Choppin v. *Wilson et al.*, 444.

11. The specific credits of a partnership, as in this case, can not be seized under execution against one of the partners, or the surviving partner. The entire interest of a partner may be seized and sold, but no specific asset, credit, or property of the partnership is liable to seizure under execution against one of the partners.

Levy & Sugar v. *Gowan & Mayo*, 556.

PILOTS.

1. The rules and regulations of the United States Board of Supervisors do not specify and particularize the short bends and points at which certain precautionary signals are to be made by steamers.

PILOTS—Continued.

In the absence of such specification by the board, it would seem then to become a matter within the judgment and discrimination of the navigators of the rivers, to determine the places where, by the rules and regutations governing pilots, signals are to be given.

A transcript of the proceedings before the United States inspectors, in relation to the sinking of the steamboat Texarkana, which gave rise to this suit, embracing the evidence taken on that occasion, was offered on the part of defendants to prove *rem ipsam*. This was objected to by the plaintiff as *res inter alios* and irrelevant. The court *a qua* sustained the objection to that extent, but admitted it for the purpose only of contradicting the statements of witnesses. The court did not err. The action taken by the board of inspectors could not bind the plaintiff who was not a party to it.

Kennett & Bell v. *Union Insurance Company of New Orleans*, 26.

PLEADINGS.

1. If the description of the instruments sued on was materially defective, the plaintiffs should have been allowed, under the circumstances of the case, an opportunity to amend before their suit was dismissed. But although the petition is loosely constructed, the documents being made a part thereof supply a deficiency therein in relation to their nature and contents, and the only consequehce of a failure to file them at the time of filing the petition is, that the defendant may refuse to answer until he has *oyer* of them.

Police Jury of the Parish of Pointe Coupee v. *A. L. Mahoudeau et als.*, 224.

2. The intervention is dismissed. The intervenor has neither alleged nor proved that she is a creditor of the defendant, whose property was sequestered.

If the intervenor had a lessor's privilege, it should have been asserted before the sequestered property was released on bond. No fraud and collusion are shown between the plaintiffs and the defendant.

The intervenor can not urge irregularities in the suit, such as insufficiency of the bond or affidavit on which the sequestration issued.

D. R. Carroll & Co. v. *H. T. Bridewell. Mrs. Lizzie Hamilton, Intervenor*, 239.

3. This court can not sustain the bill of exceptions taken to the ruling of the judge *a quo*, permitting the plaintiff to amend his petition by correcting the allegation in regard to the dates of the notes sued on, on the ground that it came too late, as the trial had commenced. Amendments should always be allowed when justice

PLEADINGS—Continued.

would be subserved thereby. If the defendant was taken by surprise, he might have obtained a continuance on that ground.

Bussey & Co. v. *J. A. Rothschild*, 316.

4. The pleas of want of citation and prescription are inconsistent. Pleading prescription is an appearance.

Nicholson & Co. v. *Mrs. A. M. Jennings*, 432.

5. As the plaintiff, W. L. Spears, resided in the parish of Claiborne, and could only have been sued there on claims against the firm of Spears & Ramsey, which he assumed to pay at the dissolution of said firm, the defendant had the right to set up the reconventional demand, which is objected to.

Whether the plaintiff owns certain claims and the notes attached to his petition, as an individual or as a liquidator, is a matter into which defendant has no interest to inquire. The same is applicable to the claim of Ramsey, who was a member of the partnership and who authorized plaintiff to settle and liquidate its affairs. Defendant has no interest in asserting the rights of Ramsey. It is sufficient if payment to plaintiff will protect defendant from a subsequent demand for the same debt by Ramsey, and of this there can be no doubt.

W. L. Spears, Liquidator, v. *Mrs. J. Spears, Administratrix*, 642.

6. No answer having been filed by the defendants, no judgment by default having been entered against them, it follows that there was no issue joined when final judgment was rendered. Without issue joined the court was incompetent to pronounce judgment. The fact that one of the defendants did not answer interrogatories within the legal delays, does not join issue with plaintiffs' demand. *G. Henshaw & Sons* v. *D. Flannery & Co.*, 671.

See Prescription, No. 5—*Henry Bidwell* v. *C. Cavaroc and Bank of Orleans*, 307.

See Evidence, No. 24—*Spears, Tutor*, v. *Mrs. Spears, Administratrix*, 537; and No. 27—*Davis* v. *Madden*, 632.

See Mortgage, No. 12—*Heard* v. *Patton*, 542.

See Damages, No. 11—*McCubbin* v. *Hastings*, 713.

PLEDGE.

1. The note sued upon having been given subsequently to the date of a written contract and identified therewith in its own terms, it was proper to permit parol evidence to show the settlement or agreement under which it was given. The plaintiffs are not enforcing the written contract in all its parts, but suing on the note given in connection with said contract, yet for a sum different from that named in the contract. The note is evidence of a change in the sum first agreed on, and is binding on defendant in the absence of error or fraud.

PLEDGE—Continued.

The defendant being the agent of the intervenors and not their factor in the purview of the law invoked by them, and having had the possession and control of the machinery delivered to them, and having pledged it to plaintiffs, who are not shown to have known that it belonged to intervenors, the pledge must be sustained. The intervenors put it in the power of the defendant to make such use of the machinery, and they must bear the loss, if any. The principle which sustains the pledge as collateral, which is placed in the hands of a broker to sell, must apply here.

J. Davidson & Hill v. *Thomas B. Bodley, Norwalk Iron Works, Intervenors*, 149.

2. This is a suit brought against defendant on a note drawn by him, and pledged as security to plaintiff by Carlos, Marks & Co. for the payment of three of their notes. The defense is that the defendant has paid two of the notes, and has tendered the plaintiff the amount of the last one, for which the instrument sued on was given in pledge, it being a note signed for accommodation and without consideration, for the benefit of the pledgers.

The plaintiff knew that the pledge was an accommodation note. In law and equity, therefore, the defendant ought not to be required to pay more than the amount for which the pledge was given, to wit: the three notes discounted by Carlos, Marks & Co., and ought not to be extended to cover money overdrawn by said Carlos, Marks & Co. But a formal real tender of the money having not been made as required by law, defendant can not be exonerated from interest and costs.

Mechanics' and Traders' Bank v. *J. Barnett*, 177.

3. In this instance, under the contract of pledge, the plaintiff had special authority to sell the collaterals at public or private sale at its option.

Article 3165 of the Revised Code was amended on the twenty-third of February, 1872, so as to make it lawful for the pledger to authorize the sale or other disposition of the property pledged, in such manner as may be agreed on by the parties, without the intervention of courts of justice. According to the judicial admissions of the defendant, it appears that the pledge was taken after the amendment of article 3165.

Louisiana Savings Bank and Safe Deposit Company v. *Cyrus Bussey*, 472.

See Bills and Promissory Notes, No. 14—*Gardner* v. *Maxwell*, 561.

See Mortgage, No. 15—*Mechanics' and Traders' Bank* v. *Powell*, 647.

POLICE JURIES.

1. As the police jury of East Baton Rouge has laid out a public road on the land of the plaintiff without allowing the jury of freeholders to assess such damages as he may sustain thereby, it has acted in violation of the law, and the plaintiff has the right to appeal to the court for an injunction restraining the police jury from illegally divesting him of his property.

N. K. Knox v. *Police Jury of East Baton Rouge*, 204.

2. There is no proof in the record that the warrants or certificates offered in evidence were issued by the parish or were authorized to be issued by the police jury.

If the warrants or certificates were authorized to be issued, they are not sufficient to justify the judgment of the court below. Police juries, in the administration of the limited powers confided to them, must provide means by taxation for the purpose and in the manner provided by law. They can not bind the parishes by putting in circulation their notes or warrants at pleasure.

Flagg v. *The Parish of St. Charles*, 319.

POSSESSION IN GOOD FAITH.

1. The defendant being a possessor in good faith owes rent only from the institution of this suit, and is entitled to his claim for the value of the improvements against the owner of the property from the time he made them, with legal interest.

Louis Dufilho v. *Henry Mayer*, 398.

2. This is a petitory action against the defendant for certain lands. The only question is that of prescription. It is well settled that, to become the basis of prescription, the title must be apparently good, and of a kind calculated to induce a belief in the purchaser that it is perfect. A title defective in form can not be a basis of prescription. By this the law means a title on the face of which some defect appears, and not one that may prove defective by circumstances, or evidence *de hors* the instrument.

A possessor in good faith is one who has just reason to believe himself master of the thing he possesses, although he may not be in fact. In this instance, it is a question of fact, and there is nothing in the record to show that the defendant had any reason to doubt that his title was good, until the institution of this suit. Hence prescription lies in his favor.

Hall & Turner, Agents, etc. v. *Timothy Mooring*, 596.

PRACTICE.

1. The answer to an appeal which asks to have the judgment amended, filed after the motion to dismiss, without reservation of the same, waives the application to dismiss.

Rhoda E. White v. *Myra Clarke Gaines*, 75.

PRACTICE—Continued.

2. Cire, the subrogee of Powhatan Wooldridge to a judgment obtained by the same *v.* E. Monteuse—which judgment was transferred from P. Wooldridge to E. Wooldridge, and by E. Wooldridge to Cire, caused a *fi. fa.* to issue in said judgment. Hedrick, the intervenor, took a rule against him to quash the writ, on the ground that he, the intervenor, was the real owner of the judgment seized in the suit of Hedrick *v.* E. Wooldridge, and purchased by him at sheriff's sale. Hedrick had proceeded by attachment against E. Wooldridge, absentee. In this attachment case several citations were made, but it seems that in every instance the returns of the sheriff were simply that service of petition and citation was made on the curator *ad hoc* in person, mentioning the name of the curator. It appears from the returns of the sheriff, that in neither of the instances were copies of the attachment and citation affixed to the door of the room where the court in which the suit was pending is held.

Proof of service of citation is not a matter *in pais*, but must appear by the sheriff's return. A court can presume nothing with regard to a party being cited.

The failure to serve the proper citation is fatal to the intervenor's claim to be the owner of the judgment forming the object of this litigation. Therefore the rule was properly discharged.

Subsequently to a decision of the lower court, that the order granted for a suspensive appeal on the part of the intervenor, plaintiff in the rule, did not suspend execution on the *fi. fa.*, said intervenor filed a petition of third opposition and prayed for an injunction, which was issued. To this proceeding an exception was filed, on the allegation that the grounds of action of the rule and of the petition for injunction were the same, and that the pendency of appeal on the rule supported the plea of *lis pendens* which was presented. This exception was properly maintained by the judge *a quo*.

Powhatan Wooldridge, Joseph A. Cire, Subrogated v. *E. Monteuse, M. S. Hedrick, Intervenor*, 79.

3. The demand in this case being in the alternative, there was therefore no ground for the order to elect. Having forced the plaintiff to elect between a demand for a judgment homologating the award of amicable compounders, which was alleged to be a final liquidation of the partnership, and a demand for a judgment on the notes given to plaintiff for half the alleged value of the property put in the partnership, the defendant could not consistently except to the latter demand on the ground that the notes were a part of the part-

PRACTICE—Continued.

nership assets, or alleged to be a part thereof, when, in truth, they were not so alleged to be.

Thomas E. M. Smith v. *Patrick Donnelly*, 98.

4. Where final judgment was rendered in favor of the two members of the defendant firm who were before the court, and the appeal was taken as to one only;

Held—That both defendants having an interest in maintaining the judgment, should both have been made parties. The motion to dismiss the appeal must prevail.

Lucy Hammitt and Husband v. *Payne, Huntington & Co.*, 100.

5. An inspection of the record in this case shows that there is no note of the evidence, and it appears that there was in fact no evidence introduced to sustain the various items in the executor's account, amounting to $678 50, grouped in said account, as "amount of privileged claims paid." Under article 1042 of the Code of Practice, the evidence in support of the claims should have been taken in writing and annexed to the record. The ends of justice require that this case should be remanded.

Succession of Celestine Dorville—in the Matter of the Executor's Account, 131.

6. The third opponents in this case attempt to regulate the effect of a seizure by a creditor with special mortgage and vendor's privilege, in what relates to them or their junior mortgage, eighteen months after the seizure had been released, the sale consummated, and the funds distributed. This is an extraordinary proceeding. There is no longer any ground for a third opposition to stand upon. The exception that there is no cause of action is well taken.

Payne, Dameron & Co. v. *Eaton & Barstow—E. J. Gay & Co., Third Opponents*, 160.

7. The respondent refuses to grant the relators a suspensive appeal on the ground that their intervention not having been filed by leave of the court, or served or put at issue, did not authorize a judgment in their favor or against them from which they could appeal. In this there was error on the part of the judge *a quo*. If the relators were not parties to the suit, it was because the judge erroneously refused to allow them to intervene. But third parties may intervene when they allege, as they do in this case, that they have been aggrieved by the judgment.

State ex rel. Mrs. Pecot et al. v. *Parish Judge of the Parish of St. Mary*, 184.

8. The certificate of the clerk of the court *a qua* as to all the matters in regard to plaintiff, defendant, and the intervenors who have appealed, is sufficiently full. The proceedings as to the intervenor

PRACTICE—Continued.

Bender, who did not appeal, are not material in the controversy between the parties before this court, and their omission from the record can not prejudice or affect the parties.

The record shows that the citations on the intervenors were served, but before the specified delay expired, and before issue was formed thereon either by default or otherwise, the plaintiff caused the default taken by her against the defendant to be confirmed and the intervention dismissed. This was irregular and premature. Issue should have been joined.

Mrs. S. C. Lane v. *Joshua G. Clarke. Heirs of Lane et als., Intervenors*, 201.

9. Section 1067 of the Revised Statutes does not repeal article 338 of the Code of Practice in regard to the recusation of judges.

State ex rel. O. Provosty, District Attorney, v. *Judge of the Seventh Judicial District Court*, 225.

10. Where the court, opening at ten o'clock, the defendant's counsel came into court at twenty minutes past ten and found his case had been submitted, the judge *a quo* did not err in refusing to reinstate it. The testimony shows that the case was not taken up out of its regular order, and defendant's counsel gave no good reason why he was not present. If he chose to take the risk of his case not being reached during his absence, he must take the result of his risk. *John Anderson* v. *J. I. Arnette and Wheless & Pratt*, 237.

11. Compensation allowed to experts, auditors and judicial arbitrators is, by article 552 Code of Practice, to be paid, as well as the taxed costs, by the party cast; and this implies a delay of payment until the termination of the suit.

James L. Lobdell v. *Bushnell and Others*, 394.

12. The proceeding by rule to annul the judgments complained of was irregular and inadmissible.

Widow E. Lefranc, ex parte, on Rule to have Inscriptions of Taxes and Judgments for the same erased, 666.

13. Where a final judgment has never been revised in the manner provided by the Code of Practice, it can not be practically reopened and reviewed, on a proceeding by rule, by the same court which rendered it, four months after it became final and while the *fieri facias* was in the hands of the sheriff.

City of New Orleans v. *Mechanics' and Traders' Bank*, 668.

SEE PLEADINGS, NO. 3—*Bussey & Co.* v. *Rothschild*, 316.

SEE GARNISHMENT AND GARNISHEES, NO. 5—*Hennen et als.* v. *Forget, Guillotet et al.*, 381.

SEE SURETY, NO. 12—*Whan* v. *Irwin et al.*, 706.

SEE DAMAGES, NO. 11—*McCubbin* v. *Hastings*, 713.

PRESCRIPTION.

1. A suit instituted in a court without jurisdiction interrupts prescription. *Henry J. Sorrell* v. *Victor Laurent*, 70.

2. This suit is brought against the sureties of a late sheriff to recover the amount of a judgment rendered against him. The main defense is the prescription of two years, pleaded under section 3546 of the Revised Statutes.

It is true that the defendants were not sued within two years from the day of the commission of the act complained of, but their principal, the sheriff, was, and this interrupted prescription as to them.

Judicial pursuit as to the principal interrupts prescription as to the surety, and suit against the surety interrupts it as to the principal.

Cohen & Wilson v. *William Golding and Francois Lacroix*, 77.

3. The defense to the plaintiff's claim is the prescription of three and ten years. The relation of the parties was that of agent and principal, and the right of the planter to sue his factor for an account is only prescribed by ten years. But if this relation had not existed between the parties, the defendants rendered an account in which they acknowledged their indebtedness. This acknowledgment would prevent the prescription of three years from applying, as to an open account.

J. E. Prudhomme v. *O. B. Plauché et als.*, 133.

4. The judgment having been rendered by default and no notice of judgment having been given when the appeal was taken, it was therefore in time.

The bond of appeal was given for the amount fixed to cover costs and in favor of the person who is clerk. This is sufficient.

The plea of prescription having been filed in this court and the appellee having asked that the case be remanded to show an interruption of prescription, under the law this must be done.

Charles Hoffman v. *J. O. Howell and I. F. Riley*, 304.

5. In this suit for damages for slander of title, Cavaroc filed a general denial; the bank, for answer, asserted title in itself, and by this answer the bank changed the suit into a petitory action in which it became plaintiff. Therefore it must succeed or fail on the strength of its own title. To this answer plaintiff pleaded the prescription of ten and thirty years.

The bank has failed to prove a valid title in its favor. But if the bank had shown that it had acquired a valid title at the marshal's sale, on which it relies, the plaintiff has acquired a valid title since then by prescription.

The plaintiff held possession since June, 1859, under titles translative of property and apparently good, till the institution of this suit in July, 1870. More than ten years had elapsed from the com-

PRESCRIPTION—Continued.

mencement of possession, and there is nothing in the record to show that it was not in good faith. Therefore the plea of prescription must be maintained.

Henry Bidwell v. *C. Cavaroc and the Bank of New Orleans*, 307.

6. All actions against the city of New Orleans, for work or labor done, either under a contract or for damages, or extra work, are prescribed unless commenced in one year from the time such work is required to be performed, or such damages are alleged to have arisen. *John Wolf* v. *The City of New Orleans*, 309.

7. The pleas of want of citation and prescription are inconsistent. Pleading prescription is an appearance.

Nicholson & Co. v. *Mrs. A. M. Jennings*, 432.

SEE JUDGMENT, No. 1—*Samory* v. *Montgomery*, 50; AND No. 6—*Alter* v. *McCullen*, 251.

SEE POSSESSION IN GOOD FAITH, No. 2—*Hall & Turner* v. *Mooring*, 596.

SEE SALES, No. 23—*Duckworth* v. *Vaughan et al.*, 599.

SEE EVIDENCE, No. 28—*Goodman* v. *Rayburn*, 639.

PRIVILEGE.

1. Judgment having been rendered in favor of John Coleman & Co., with privilege on a certain piece of property on Rampart street, New Orleans, which privilege was for having paved the street in front thereof, said property was sold by the sheriff and bought by John Coleman. It had been previously mortgaged to the plaintiff for a sum in excess of the amount realized at the sale. Mrs. Dunning, the plaintiff, issued executory process, and the sheriff declined to sell the property under her mortgage, as he had already sold it under Coleman's privilege. Mrs. Dunning now sues John Coleman & Co., to have the sale rescinded and her mortgage declared to have priority over Coleman's privilege.

Article 684 of the Code of Practice and article 3274 of the Civil Code of 1825, which has not been repealed or changed by any special legislation, govern this case. The act of 1840, on which the defendants rely, even if that act were admitted to be in force now—a point on which no opinion is expressed—gives them the privilege claimed, but on certain conditions. When they were complied with, it was too late to have any effect on the plaintiff's mortgage.

The Statute of 1840 does not, in any manner, repeal or change the article of the Code above quoted, in regard to the time when the privilege shall be recorded. It simply fixes the length of time which the privilege is to endure. As the privilege under which the sale took place was not superior to the plaintiff's mortgage, and as the price bid was not sufficient to pay her mortgage, it fol-

PRIVILEGE—Continued.

lows, under the article of the Code of Practice above cited, that there was no legal adjudication, and therefore that there was no sale.

The court *a qua* did not err in nonsuiting plaintiff as to the claim she made against Coleman, to cause him to make restitution of the rents received by him since the sale, to be placed to the credit of her debtor. The plaintiff would have had no authority for making these rents responsible for her debt, if the property had remained in the hands of her debtor.

Her rights rested on the realty and not on its revenues.

Mrs. O. K. Dunning v. *John Coleman & Co.*, 47.

2. The effects of a third person equally with those of the lessee, are, by article 2707 of the Civil Code, made subject to the lessor's privilege, when they are by his consent contained in the house or store of the lessor. By analogy it would seem that the privilege would continue to attach like those of the lessee, and on the same conditions, for fifteen days after removal. But by the well established rule that privileges are *stricti juris*, this court is precluded from assuming that the effects of a third person are affected by the lessor's privilege after their removal from his house or store. The law declares a privilege in favor of the lessor on the property of third persons only on the conditions imposed in article 2707 of the Code, and to those conditions it is thought that the privilege must be restricted.

E. T. Merrick, Race & Foster v. *Emile La Hache—St. Louis Piano Manufacturing Company, Intervenors*, 87.

3. Where a patent, transferred for full paid in stock to a company, was subsequently seized and sold by the creditors of said company and bought by the original proprietor of said patent, who paid the amount of the sale into the sheriff's hands, and claimed the same by virtue of his vendor's alleged privilege, as third opponent;

Held—That the clause in the charter that the full paid stock should not be issued until the *ordinary* stock should be taken, and its non issuance in consequence thereof, did not make the third opponent any the less the owner of his shares. Considering his transaction with the company as a sale, he received the price, and hence has no vendor's privilege, nor would he have any if considered as an exchange.

Daniel and James D. Edwards v. *The Bringier Sugar Extracting Company—Third Opposition of M. S. Bringier*, 118.

4. The franchise of the plaintiff is property, and it has been injured in the enjoyment thereof by the claims and pretensions of the defendant, founded on a statute alleged to be unconstitutional and

PRIVILEGE—Continued.

void. It is true, the right of the plaintiff to make and vend gas will begin on the first of April, 1875, but the right to sell shares of its capital stock, to the amount of three millions of dollars and the duty to erect works, buildings, machines, lay gas pipes, and prepare everything necessary to begin the enterprise or business, vested the moment the corporation began.

A void title set up to defeat the plaintiff's right to prepare for their business, invades their charter as effectually as if set up to obstruct the business after it had begun.

This is not an action of damages under article 2315 of the Revised Code. The plaintiff has shown an injury, and if there is no express law giving a remedy, it can appeal to the equity powers of the court for redress. Revised Code, art. 21. The exception to the petition of plaintiffs on the ground that it discloses no ground of action can not be maintained.

Crescent City Gaslight Company v. *New Orleans Gaslight Company*, 138.

The purpose to extend the charter of the New Orleans Gaslight Company for twenty years from the first of April, 1875, is no more disclosed in the title of the act, entitled "An Act to extend the area of gas lighting in the city of New Orleans and to reduce the price now paid by consumers," than the purpose to create a new corporation for making and vending gas is indicated therein. The prolonging of defendant's corporation for twenty years virtually gives a new charter for that period. Moreover, the title is deceptive and calculated to mislead the mind from the true object of the statute. Hence, the statute is repugnant to article 115 of the constitution of 1852 then in force, and is therefore void.

Nothing but a valid statute of the State could confer the grant extending the charter of the defendant until 1895, and the act of March 1, 1860, which had that object in view, being unconstitutional, was utterly void from the beginning.

The act incorporating the plaintiff's company, conferring on it the sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years from the first of April, 1875, is not repugnant to article 114 of the constitution of 1868, then in force, requiring the object or objects of every law to be embraced in the title. The object of the act as stated in the title was "to incorporate the Crescent City Gaslight Company." To incorporate a company is to create it with certain powers and privileges. These powers and privileges need not be detailed. The title of the act disclosed the creation of a gaslight company. This was sufficient to cover the monopoly or exclusive privilege to make and vend gas. *Ibid*, 138.

PRIVILEGE—Continued.

An exclusive privilege or monopoly can be granted under the usual title to incorporate a company. The grant of the monopoly complained of in this case does not violate the constitution, and is valid.

The State intervening, not to set up some separate right of its own, but solely for the purpose of upholding the rights of the plaintiff against the defendant in regard to a franchise granted by itself, has no interest whatever in the controversy, and the court below did not err in dismissing the intervention.

In regard to the intervention of the city of New Orleans, the right reserved by the State for it to become the purchaser of the gas works, fixtures, etc., at the expiration of the charter of the defendant was not such a vested right that the State could not withdraw or recall without contravening that provision of the constitution of the United States prohibiting a State from impairing the obligations of a contract.

Even conceding that the authority given to the city if she saw fit at the expiration of the defendant's charter to purchase the gas works by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived; and the grant of the right and exclusive privilege to plaintiff to make and vend gas is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. This grant by implication revokes or recalls any previous authority given the city to buy the gas works of defendant on the first of April 1875. This is violating no contract protected by the constitution of the United States. The intervention of the city can not be maintained. *Ibid*, 138.

5. One must be sued before the judge having jurisdiction of the place of one's domicile, except in the cases provided in the Code of Practice. The case of a factor having a lien for his advances on a crop is not embraced in the excepted cases.

A court without jurisdiction to try the principal demand can not try an issue accessory thereto. A court that can not determine whether or not a debt exists, for want of jurisdiction, can not decide that there is a privilege, because the latter can not exist without the former.

A sequestration is merely a conservatory order. A court without jurisdiction of the case can render no order whatever binding the parties, and consent can not give jurisdiction.

Edward J. Gay & Co. v. *Eaton & Barstow*, 166.

6. The furnishers of supplies or cash actually used for the cultivation

PRIVILEGE—Continued.

of a plantation have a privilege on the crops of that year, and it can not be divested by any prior mortgage, whether legal, conventional, or judicial, or by any seizure and sale of the land while such crops are on it, and such privilege bears on the growing crop.

As against the Citizens' Bank holding a conventional mortgage recorded in January, 1868, E. J. Gay & Co. have no preference for the supplies they furnished the defendant from January till April 23, 1873, because their claim was not recorded on the day the contract was entered into. Privileges are *stricti juris*, and persons desiring to affect third parties therewith must register them in the manner required by law.

Construing articles 3273 and 3274, Revised Code, so as to give effect to both, the conclusion is that privileges have effect as to third persons generally from the date of their registry; but for a privilege to have a preference over an existing mortgage it must be recorded on the day the contract out of which it arises was entered into. *Bank of America* v. *Fortier*, 243.

7. There are several reasons why the privileges of the overseer and laborers set up by the third opponents as subrogees have no preference over the prior mortgage claim of the plaintiff, the most important being that said privileges were not recorded in the parish where the property is situated on the day the contracts out of which they arose were entered into.

Harriett G. Adams v. *Edward W. Adams. John Chaffee, Bro. & Son, Third Opponents*, 275.

8. The suggestion to dismiss this appeal is made under the statute No. 25, acts of 1874, but is not in reality supported by any one of its provisions. An appeal can not be dismissed upon a mere suggestion in argument after the case has been taken up on its merits, without any reservation of the right to move to dismiss.

This court does not see how it is possible to recognize a privilege in favor of laborers on mules, agricultural implements, etc., sold in 1873 for work done by them on a plantaion in 1872.

Succession of G. S. Dufossat et al. v. *B. S. Labranche et al.—Opposition of R. Brown et als., laborers*, 283.

9. When the city of New Orleans purchases a piece of property and gives its bonds therefor, the bonds must be considered as a payment of the price, and the property thus acquired, unless the contrary be expressly stipulated, is free of all incumbrance, such as vender's lien and privilege.

As the vender's privilege need not be stipulated in the act of sale, but results from the nature of the debt, so it need not be expressly

PRIVILEGE—Continued.

renounced, but may be implied from the terms of the instrument. This implication must, however, be clear.

Sam Smith & Co. v. *The City of New Orleans and Recorder of Mortgages*, 286.

10. There is a wide difference between the bonds issued in the name of and payable by an important political corporation and an individual promissory note. Bonds are commercial securities, and have characteristics of currency. They do not depend for their value upon the thing for which they were given.

Where, as in the contract of sale relied on in this instance, payment was made in bonds, it was as if the price had been paid in current money. The language of the contrat and of the act itself, on which it is based, implies such an intention, and indicates that it was meant to give a full discharge of the debt, without the reservation of any lien or privilege to secure the bonds at maturity

Sam Smith & Co. v. *The City of New Orleans and Recorder of Mortgages*, 286.

11. Privileges have effect from the date on which the act or other evidence of the debt is recorded in the parish where the property affected is situated. But to have effect against those who have acquired, not who may acquire a mortgage, it must be recorded on the day it was entered into. The limitation relates only to the effect as to mortgages existing at the date of the privilege contract, and requires that such contract shall be recorded on the day of its execution in order to have a preference over mortgages then duly inscribed.

E. J. Gay & Co. v. *R. D. Bovard—J. A. Holmes, Third Opponent*, 290.

12. As this suit could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, it can not for the same reason be transferred to that tribunal.

Besides, De Boigne, one of the defendants, although a citizen and resident of France, was not competent to sue in the United States Circuit Court on the note and mortgage set up by him, because his transferrer, the payee thereof, was a citizen of this State and had no such right.

Where the property of one against whom judgment had been rendered appears to be subject to privileges or mortgages entitled to preference over the judgment creditor, the latter may, by a rule to show cause, as incidental to the proceedings had for the purpose of selling the property, call upon those claiming such privleges or mortgages to show cause why they should not be erased; and the

PRIVILEGE—Continued.

seizing creditor can not be required to resort to a direct action against persons holding such mortgages and privileges.

When the prescription that had already acquired on the mortgage note held by De Boigne was renounced, the plaintiffs were judicial mortgage creditors. The waiver renewed the debt for the person making said waiver, but it did not revive the mortgage as to plaintiffs or to their prejudice.

New Orleans Canal and Banking Company v. *The Recorder of Mortgages of the Parish of Pointe Coupee et als.*, 291.

13. The evidence establishes the lease for the time claimed, but the court erred in granting a privilege, as it is shown that the furniture was moved from the premises two or three months before this suit was brought. *Mrs. A. Langsdorf* v. *LeGardeur*, 363.

14. Plaintiffs, in this instance, rely on a judgment in their favor, which, however, did not grant them a privilege on a certain property belonging to Stinson, although claimed in that suit. They rested satisfied with the judgment and had it recorded. The consequence of their acquiescence in that judgment is the loss of their privilege so far as third parties are concerned. But even if that judgment did not settle the claim of plaintiffs adversely to them, they have lost their privilege by failing to reinscribe it within ten years. The privilege was recorded in 1860; the judgment was recorded in 1861, and there had been no reinscription thereof in 1872, when defendants foreclosed their mortgage.

Nicolson & Co. v. *Citizens' Bank*, 369.

15. The plaintiff had no privilege on the boat, as he claims, because the $500 advanced by him were to cover the expenses which he undertook to defray. The sequestration was therefore wrongfully issued.

L. A. Welton v. *R. P. Burton, Captain, and the Owners of Steamboat Ruth*, 448.

16. In this instance the contract for repairs and improvements was entered into on the seventeenth of June and was not recorded until the nineteenth of said month. By the law, the privilege of the contractor in such a case does not have preference over creditors whose mortgages then had force.

Citizens' Bank of Louisiana v. *St. Louis Hotel Association and J. Cockrem, Receiver and Third Opponent*, 460.

17. The delay to record an act of sale can not defeat the vendor's privilege and mortgage in favor of a creditor of the vendee who held a legal or judicial mortgage against him, if the mortgage and privilege were recorded at the same time with the act of sale.

Aimee Joumonville, Wife of E. Vives v. *A Jackson Sharp*, 461.

PRIVILEGE—Continued.

18. The privilege conferred on the widow in necessitous circumstances is superior to all other privileges, except those of the vendor, and those to secure the payment of expenses incurred in selling the property.

Succession of George. W. Rawls—Opposition to Tableau of Debts, 560.

See Lessors and Lessees, No. 4—*Case* v. *Kloppenburgh*, 482.

See Succession, No. 8—*Succession of Haggerty*, 667.

PRIVY.

1. The privy, in this instance, being built upon the yard or space of ground belonging in common between the parties, the defendant had no right to place or keep said privy on it without the consent of his co-owner. *Martin Kenopsky* v. *Mark Davis et al.*, 174.

PROTEST AND NOTICE.

1. Article 313 of the Revised Code and article 964 of the Code of Practice do not authorize the appointment of a curator *ad hoc* for the purpose of receiving notice of protest, nor was the plaintiff required to serve notice on the curator, who was not appointed as such until fifty-one days after the protest.

Neither the plaintiff nor the notary seem to have had any knowledge that, ten days before service of notice of protest, the heirs of the indorser of the note sued upon, had filed a petition for his interdiction, and no information in regard to it was communicated to the notary when he handed the notice of protest addressed to the indorser to his son-in-law at the residence of said indorser.

At the time of the protest, no legal representative having been appointed for the indorser, the notice addressed to him and left at his domicile on the day of protest was sufficient to fix his liability. The plaintiff, through the notary, had exercised reasonable diligence and given such notice of protest as under the existing state of facts the law required to be given.

Mrs. Estelle Rosa Weaver v. *D. B. Penn and Alfred Penn*, 129.

See Bills and Promissory Notes, No. 15—*Rayne* v. *Ditto*, 622; and No. 17—*McNabb* v. *Tally & Duncan*, 640.

PROMISSORY NOTES.

See Bills and Promissory Notes.

PROCESS OF LAW.

See Offices and Officers, No. 8—*Fitzpatrick* v. *City of New Orleans*, 457.

PUBLIC SERVITUDE.

1. The joint resolution of the Legislature upon which defendant relies in this case, and the title of which is: "A joint resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Com-

PUBLIC SERVITUDE—Continued.

pany, a corporation of the State of Alabama," sufficiently discloses the object of the resolution. It is not therefore unconstitutional.

The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. The right of that body to grant the privilege to corporations or individuals to make and maintain wharves has long been settled. In this instance the State granted the right to the riparian owner. This is permissible. The grant was not a donation of public revenues to a private purpose. It was the control by the Legislature of a public servitude.

The City of New Orleans v. *New Orleans, Mobile and Chattanooga Railroad Company*, 414.

REMITTITUR.

See Injunction, No. 1—*John T. Michel* v. *Zerilla Meyer et al.* 173.

RES JUDICATA.

1. What was never of record can not be supplied by parole. The ruling of a court upon the exclusion of evidence must be of record.

The plea of *res judicata* does not rest on the regularity of the proceedings, which can be removed on appeal, but upon the force of the judgment pronounced on the demand and cause of action between the parties.

Mrs. Isabella A. Fluker v. *Mrs. Harriet Herbert. Mrs. Barkdull called in warranty*, 284.

2. The plea of *res judicata* can not prevail, as there was a judgment of nonsuit as to the portion of the claim embraced in this action.

Mrs. A. Langsdorf v. *S. LeGardeur*, 363.

See Surety, No. 7—*Kimbrough* v. *Walker et als.*, 566.

See Executor, No. 2—*Wells* v. *Annie Alexander and Husband*, 624.

SALES.

1. In regard to the error in the advertisement about the exact number of feet the property possessed fronting on the street, it is an irregularity which ought not to vitiate the sale, the proceedings appearing to be regular. *Dockham* v. *Potter*, 73.

2. Where a bill of exceptions was taken to the admission in evidence of an act of sale set up by defendant as the source of his title, on the ground that the vendor was, when she executed the act, a married woman unauthorized in any manner to execute the deed;

Held—that the court *a qua* did not err in admitting the evidence. The want of authorization of the husband, or of that of the court if the husband refused his assent, rendered the act she performed a relative nullity only, and one which only the husband or wife, or their heirs could set up proceedings to annul.

SALES—Continued.

The right of the party assailed in a petitory action to inquire into the validity of the proceedings under which the party attacking acquired title can admit of no doubt.

A purchaser at sheriff's sale can not maintain a petitory action to recover the property, where it has not been actually taken possession of by the sheriff in making the seizure.

An adjudication under an illegal or insufficient seizure conveys no title.

In this case, the whole proceeding purporting to be *in rem* was carried on up to the very day of the sale without the knowledge of the defendant, the owner of the property, who was by himself or tenants in actual possession thereof. The special law establishing certain formalities to be observed in judicial proceedings in order to constitute a seizure of real estate in the parishes of Orleans and Jefferson, does not apply to a case of this sort. That law, acts of 1857, p. 185, directs that notice is to be given to the party whose property is to be seized, to be followed by the recording of the notice in the office of the recorder of mortgages. *Dennis Cronan* v. *Edward Cochran et als*, 120.

3. In this suit, instituted by plaintiff to recover his share in the succession of his grandfather and grandmother, the only question being whether the Second District Court, parish of Orleans, had jurisdiction to issue the order of sale to operate said partition;

Held—That the court *a qua* did not err, under the state of facts existing in the case, and by virtue of article 924 of the Code of Practice, in maintaining its jurisdiction. Having jurisdiction it could order the sale of the property to be partitioned, and it follows that the liens and mortgages on the property sold were shifted to the proceeds. The opponent, Sickerman, retains his right to participate in said proceeds to the extent of his mortgage. The purchasers of said property could not be compelled to pay the price before they were tendered an unencumbered title, and al that they required was the erasure of the mortgages on the property sold. *Charles Diamond* v. *Robert E. Diamond et als*, 125.

4. This is a suit to force compliance with the terms of adjudication of property. The defense is want of title in the seller, the administrator of the Trainor estate. Trainor bought the lot about which the dispute is as to title, at a tax sale made in August, 1860, at the suit of the city of New Orleans, for city taxes. The sale was made under the provisions of the act No. 85 of the session of 1858, and act No. 175 of 1859, additional thereto. The provisions of these acts not having been complied with in the tax sale, it fol-

SALES—Continued.

lows that the evidence does not establish a valid title in the succession of Trainor.

Successions of John and Mary Trainor, 150.

5. As Charles M. Conrad was an offender of a class mentioned in the act of Congress of the seventeenth of July, 1862, entitled an act to suppress insurrection, etc., this statute authorized the confiscation of his property, or the condemnation and sale thereof for the period of his life. By the decree of condemnation of the third of February, 1865, only such right or title as the offender had, passed to and vested in the United States, and this was the title conveyed to plaintiff by the Marshal's sale on the twenty-ninth of March, 1865.

But Conrad, at that time, had no title to the property, having sold it to the defendants by notarial act in the parish of St. Mary, on the third of June, 1862, not only prior to the seizure, but anterior to the passage of the confiscation act itself, although the act was registered only in 1870 in the parish of Orleans, where the property is situated. Hence the United States acquired no title and could not convey any to plaintiff.

In regard to the property confiscated, the position of the United States was not that of a third party dealing with Conrad on the faith of the title standing in his name on the public records, or that of a bidder at a judicial sale, who is induced to buy the property standing on the public records in the name of the defendant in execution.

The failure of defendants to record their title in the parish of Orleans, as required by the registry laws of the State subjected them to the risk of losing it, if seized by a creditor of their vendor, or if sold or hypothecated by him to an innocent third party. But the title of the property was nevertheless in them from the time of the sale, and neither their vender nor his heirs could recover it from them.

As to the United States it was immaterial whether defendants had recorded their title or not; the property in question belonged to them and their title was not impaired by the proceedings under the act of July 17, 1862, instituted to confiscate the property of Charles M. Conrad for offenses committed by him. The defendants were not parties to these proceedings and their title to the property could not be divested by the decree of condemnation.

E. W. Burbank v. *C. A. & L. L. Conrad*, 152.

6. The only objection urged by plaintiff to the sale in this case is that the price was paid in Confederate money.

There are three grounds fatal to the objection:

First—The contract by which the defendant acquired the property

SALES—Continued.

in 1864 was an executed judicial sale, which is protected by article 149 of the constitution of 1868.

Second—The plaintiff, by receiving $350 of the proceeds in national currency, being the estimated value of the Confederate notes received as the price, ratified the sale.

Third—The plaintiff can not keep the price or any part thereof, and claim the thing sold. *Sarah S. Tilsen* v. *Catherine Haine*, 228.

7. Where the property of the succession was offered for sale for cash, and, no one bidding, it was immediately offered on the terms of credit designated in the order, and was adjudicated to the administrator thereof, who directed the sheriff to adjudicate it to one Mrs. Simmons, a person having no real intention of purchasing, but receiving the adjudication only as an act of friendship to the administrator;

Held—That the succession never was divested of the property.

Ambrose et al. v. *Madison Marsh*, 241.

8. The question in this case is whether an act of sale was simulated. The judge *a quo* held it to be a simulation, because the plaintiff in injunction moved to strike out interrogatories on facts and articles propounded to him, on the ground that they tended to make him confess himself guilty of a crime in seeking to make him contradict his affidavit annexed to his petition for injunction, which motion was withdrawn by permission of the court. The fact of filing such an injunction can not be considered as producing the effect given to it by the court below. It is not an admission of simulation, but must be presumed to be the interpretation which plaintiff's counsel gave of the tendency of such interrogatories. When put on the stand to answer said interrogatories, the plaintiff asserted the reality and good faith of his purchase, his ability to pay the price, and the actual payment thereof. The testimony in favor of the reality of the sale is not overcome.

Oliva Theriot v. *G. Lyons, Sheriff, et al.*, 253.

9. It matters not what informalities affect the sale from Mrs. Pope, one of the defendants, to the intervenor. As the plaintiff is not a creditor of the seller, he can not complain. If he has abused the harsh remedy of attachment, he can not escape liability by questioning the title given to the intervenor.

Joseph Moore v. *Mrs. Sallie Pope and Husband—Willis J. Pope, Intervenor*, 254.

10. An actual corporeal possession of property seized must take place in order to make a sheriff's seizure valid, and to render a compliance with the law complete. The sheriff must have the property in his own possession and under his own control, or in the posses-

SALES—Continued.

sion and under the control of some person duly appointed and authorized by him.

Mrs. Mary O. Gordon v. *Patrick Gilfoil—J. H. Gilfoil Intervening*, 265.

11. As the answer does not disavow the signature of the deceased, or as the heirs do not declare in the answer that they know not the signature, but, on the contrary, aver that it is an act under private signature void for simulation, or null as a disguised donation for informalities, the plaintiff was not bound to prove the signature further than she did by the testimony of one of the subscribing witnesses, and the preliminary evidence on which the deed had been admitted to registry.

As the defendants have received from their ancestor, independently of the property in controversy, the full amount of their *legitime*, they can not attack for simulation the sale which he made to the plaintiff, and parole evidence in support of said charge was properly rejected.

As the ancestor of defendants could, however, have shown the simulation of the sale by a counter letter or by interrogatories on facts and articles addressed to plaintiff, the defendants, his heirs, have the same right. Therefore, the interrogatories on facts and articles which plaintiff failed to answer were properly taken for confessed, and they establish the simulation of the sale beyond doubt.

Mrs. Corinne Tesson and Husband v. *A. L. Gusman et als.*, 266.

12. While there are facts in the evidence calculated to raise some doubt in regard to the perfect good faith of the transactions between the father and the son as to the creditors of the former, yet the sale of the property in question from the former to the latter can not be treated as a pure simulation. The sale may have been resorted to for the purpose alleged by plaintiff, but, whether for fraudulent purposes or otherwise, could only have been successfully assailed by a revocatory action, which the plaintiffs have debarred themselves from bringing by permitting the time to elapse within which that action might have been instituted.

Currie, King & Co. v. *J. O. Pierce et als. Scott & Brother* v. *The Same. (Consolidated.)* 268.

13. It appears from the mortgage certificate that the judgment of Dudossat, defendant in injunction, creates a judicial mortgage prior in rank to the judicial mortgage of plaintiff in injunction. The preference that Soulié acquired from a prior seizure of Ranson's property can not defeat the existing prior mortgage on the property in question, which seems to be all that remains belonging to the seized debtor. When sold, the property was adjudicated

SALES—Continued.

to Soulié, who refused to pay over the money to the sheriff, whereupon the sheriff was proceeding to resell the property when enjoined by Soulié on the ground that he had the right to retain the money in satisfaction of his judgment. This was wrong; Soulié should have complied with his bid; a *concursus* was his remedy. The sheriff was right when proceeding to resell, and the injunction was wrongfully taken.

Lehman, Newgass & Co., A. Dudossat subrogated v. *Louis Ranson. On injunction of Bernard Soulié*, 279.

14. There is no law which requires the sheriff of a country parish to announce at a sale under a writ of *fieri facias* the amount of taxes due on the property offered. The doing was mere surplusage on his part, and as it invaded no one's rights, it could cause no injury.

The fact that the bond of the adjudicatee was not given within three days after the adjudication is no ground to annul the sale in a suit instituted by the codebtors of the defendant.

That the judgment debtors, plaintiffs in this suit, have never had an offer of delivery of the surplus money or twelve months' bond for over $530, coming to them under the adjudication made to them, is no ground to set aside the sale. It might be a ground for them to pursue the sheriff to a fulfillment of his duty.

That the act of sale allowed to a judgment creditor more than was coming to him, at the expense of the judgment debtors, is no reason for annulling the sale. The excess is something over ten dollars. This trifling error could have been corrected in the court below.

That the act of sale and return of the sheriff say nothing about interest is no reason why the sale should be annulled.

That the sheriff did not, within ten days at furthest from the adjudication, deliver or direct to the clerk of the court the original of the act of sale, the delivery having been made fourteen days after the adjudication, is no ground to annul the sale.

A. L. Gusman et als. v. *Gustave LeBlanc, Sheriff, et als.*, 280.

15. Admitting that the New Orleans Mutual Insurance Association had no right to purchase the property in controversy from Fairbanks & Gilman, it does not make said property liable to Fairbanks & Gilman's creditors in payment of their debts. If the company did any thing contrary to law, the result might be the failure of its charter, but this court does not understand the law to be that if a corporation acquires property in a manner even prohibited by law, the property thus acquired still belongs to the vendor who has received his price, and that it can be seized by his creditors to pay his debts.

SALES—Continued.

The sale of the machinery (the property in question) was a valid sale. Fairbanks & Gilman remained in possession it is true, but they held by a precarious title, to wit, a lease from the purchasers, and could have been divested of possession at any time, if the conditions of the lease had not been complied with.

The machinery thus sold to the New Orleans Mutual Insurance Company was paid for by Fairbanks & Gilman either at the time the sale was made or before this suit was instituted. This would, of course, destroy whatever privilege the Edwards, plaintiffs, had as venders. But all the machinery and materials which were not mentioned in the act of sale to the said insurance company and all the machinery and materials put into the building by D. & J. D. Edwards since that sale are liable to their execution. Whether or not the company have the landlord's lien on these effects can not now be settled. If they have, when the property is sold, they can exercise it.

The intervention of Cavaroc & Son must be maintained as to the sugar and molasses seized. These articles had been furnished to be refined for a compensation to Fairbanks & Gilman of two-thirds of the profits Cavaroc & Son might make. These relations between Cavaroc & Son and Fairbanks & Gilman were not those of partners, each liable for the acts of the other. No part of the property seized ever belonged to Fairbanks & Gilman. What they were to receive from Cavaroc & Son was, in reality, only a stipulated price for work which they agreed to perform. Whether Cavaroc & Son owed anything to Fairbanks & Gilman or not, on account of their transactions, is another matter. But this question can not be decided in the present controversy.

D. & J. D. Edwards v. *Fairbanks & Gilman. Charles Cavaroc & Son* v. *D. & J. D. Edwards*, 449.

16. Where a judgment of partition and sale was rendered without all the parties in interest being parties to the suit of partition, said judgment is an absolute nullity, and the sale made under it is also null and void. *Succession of Ernest Porée*, 463.

17. The plaintiff is himself a ship carpenter, and all the defects which he alleges to be in the schooner which he purchased at a public sale, if they existed, being apparent, he can not complain that the property he purchased was not what he had a right to expect it would be.

James H. Lynch v. *Mrs. E. Kennedy and Husband*, 464.

18. He who sells a credit or incorporeal right warrants its existence at the time of the transfer. The seller does not warrant the solvency

SALES—Continued.

of the debtor, unless he has agreed to do so. There is no lesion in such sales, and no relief can be granted.

Milton Benner v. *Warner Van Norden et al.*, 473.

19. The false statement by defendant in the act of sale to the plaintiff of a certain piece of property, that said defendant, as universal legatee, had the capacity to purchase the property adjudicated to him at the succession sale of Polly Vassant, led the plaintiff into error in regard to the material part of the contract to his prejudice, and this assertion was an artifice whereby the defendant succeeded in effecting the sale, which therefore is void, because the pretended adjudication to defendant was an absolute nullity, and his sale of the property to plaintiff was the sale of a thing belonging to another.

The doctrine that the purchaser who has paid the price, and who has not been disturbed in his possession, can not demand the restitution of the price, is applicable only to a valid contract of sale. It has no application to a contract void for want of consent, and entered into in error produced by the fraud of the opposite party.

Formento v. *Robert*, 489.

20. This is a petitory action, based on untenable grounds. The sheriff, under whose sale the tract of land is claimed, never had possession of the property which he pretended to sell. He never seized it, except by giving notice of seizure. To constitute a valid seizure of a plantation, cultivated as such, the sheriff must take the property into his possession and custody.

D. C. Morgan v. *E. M. Johnson*, 539.

21. The plaintiffs sue to annul a probate sale on the ground of fraud and collusion between the administrator and the purchasers to sacrifice the property and evade the pursuit of the creditors of the succession.

The exception that a ratification of the sale by plaintiffs resulted from the filing by them of a third opposition, and claiming the proceeds, is well taken. The purchasers bought no doubt under what probably appeared to them regular proceedings and apparently in good faith. They should be protected.

The objection that the land was not divided into lots and sold in lots, as prescribed by law, is without much force. No survey was made, but the lots were sufficiently designated by means of the map of the official United States survey and sold in portions easily ascertainable. No such illegality thereby arose as to work nullity of the sale.

Walker & Vaught v. *G. W. Kimbrough, Administrator, et al.*, 558.

22. In this petitory action plaintiff claims that her posthumous birth

SALES—Continued.

destroyed her father's will; that the executor became thereby incapable to act; and that the sale made by him, as such, conveyed no title to the purchaser, who subsequently transferred it to the defendant.

Prima facie, the title acquired by the first purchaser was a good one. The property had been sold under an order of a competent court, made at the instance of one apparently authorized to apply for it Purchasers are not bound, at their peril, to inquire, when property is advertised for sale by an executor, whether any thing has occurred, outside of court, to destroy the will under which he is acting.

Besides, the succession of plaintiff's father being insolvent, and the property which she now claims having been applied, as was proper, to the payment of his debts, it is not seen how she has been injured by the sale of which she complains.

Robertine Green v. *The Baptist Church of Shreveport*, 563.

23. The plea, in this instance, that the lands were not surveyed and sold in lots as required by the constitution, can not be maintained. It is true that a survey of the lands was not made, but they were divided up into lots as required by law, and the lots were appraised separately; the lots were described according to the survey made by the government, and the sale was made in lots. This was sufficient.

The fact that the lands were sold under the last inventory ordered by the court instead of the first, is no ground for annulling the sale.

The order of the court having jurisdiction of the succession, which ordered the sale during the provisional administration of the public administrator, has not been appealed from, and is not an absolute nullity. Purchasers in good faith need not look beyond the order of sale made by a court having jurisdiction of the succession. They are not affected by antecedent irregularities. The jurisprudence on this point is settled.

The note sued upon is not prescribed. The name of the former administrator indorsed on it on the twenty-eighth of December, 1868, and the placing of this claim on the tableau, arrested the current of prescription, and it has not since acquired.

E. D. Duckworth v. *W. H. Vaughan, Public Administrator, et al.*, 599.

24. This is a petitory action for a tract of land. The plaintiff bases her title on a patent in her favor, issued by the United States, for the lands in controversy. The defendant claims by location of an internal improvement warrant; the plaintiff by virtue of the act

SALES—Continued.

of 1851, giving *bona fide* purchasers from Maison Rouge a preference in purchasing from the United States. Each party displays a chain of title from Cox, holding under Maison Rouge, down to Copley. The tract of land was acquired by Brigham from Cox. He improved and cultivated it as a whole for several years before he sold it. It was then divided and owned by two different persons, and lastly Copley became owner of the whole tract as an entirety, in the same manner that Brigham owned it after the purchase from Cox. If Brigham had remained owner, there is no doubt he could have entered the entire tract at the minimum government price. If so, when the two divided halves of said tract were reunited in Copley as one owner, and the same status existed as when Brigham owned the entire tract, there can be no forcible reason why cultivation and improvement upon any portion of the entire tract, whether upon the upper or the lower half, at the time when division existed, did not carry with it the right to purchase the whole of it at government price.

Copley was owner of the entire tract in 1844, and cultivated upon it several years before 1849. This entitled him to the benefit of the provisions of the act of Congress, enacted in the interest of persons who purchased lands in the Maison Rouge grant under the title of Cox.

If frauds were perpetrated and malpractices resorted to by Copley in procuring transfers to himself, they were acts that took place seven years at least before the defendant's alleged purchase and settlement. These frauds, if they were frauds, did no injury to the defendant. If injury resulted to anybody, it was to the parties with whom he dealt; but thirty years have intervened, and it does not appear that either they or any of their heirs have ever complained.

Under the act of Congress of twenty-seventh January, 1851, all the lands within the limits of the Maison Rouge grant were reserved from sale, entry or location from the date of the act until three months after the public notice required to be given by the second section of the act. That notice was not given until the twenty-fifth of October, 1853. Hence, on the fifth of September, 1853, the defendant was debarred from making a location of her internal improvement warrant upon any land within the limits of the Maison Rouge grant; and subsequently, in December, 1854, and on the twenty-first of January, 1855, when she again applied to locate it, it was out of her power to locate it upon the lands in controversy, because before her last applications were made, those lands had been secured to plaintiff under pre-emption right in

SALES—Continued.

pursuance of the provisions made by law in favor of purchasers in good faith under the title of Cox, and who had improved and cultivated those lands. Therefore, defendant never acquired any title and plaintiff did.

M. A. Copley, Administratrix, v. *Dorcas Dinkgrave*, 601.

25. The question in this case is, whether the defendant had a right to dispose of a certain lot of cotton which he had sold to plaintiffs, and which plaintiffs failed to receive, to have weigned and to pay for, within a reasonable time and according to practice and the custom of trade prevailing in New Orleans, which allows only a delay of three to five days at the utmost for doing what is necessary to compell the execution of the contract.

It appearing, under the circumstances of the case, that the seller was sedulous, if not importunate, in his endeavors to close the sale, and that he extended to its utmost limits the period usual after a sale for receiving and paying, and it appearing also, on the other hand, that the buyers continued tardy and inactive until the sixth of January about receiving and paying for the cotton which they had purchased on the twenty-ninth of December preceding, and until defendant's patience, as he expresses it, "was at an end," it results that plaintiffs have no right to recover what they claim to be due to them by defendants.

Tabary & Amory v. *T. F. Thieneman*, 720.

See Judgment, No. 7—*Lirette* v. *Carrane*, 298.

See Jurisdiction, No. 12—*Succession of William Bobb*, 344.

SHERIFF'S FEES.

1. This is a suit against the defendant, a former sheriff of the parish of Orleans, to recover from him an aggregate amount of costs and sheriff's fees alleged to have been paid him above what he was entitled by law to collect from the city in criminal cases.

Under the provisions of the statute of 1857 the City Council could not go, in this matter, behind the certificates of judge and clerk. No material change has been made, on this point, under the provisions of section 1042, page 471, of the Digest of 1870. In the former case the treasurer was required to pay the sheriff's bills *upon* the certificate of the clerk and the presiding judge; in the latter case he is required to pay them *after* an account thereof shall be duly certified to be correct by the clerk of the court and the judge.

Taking the context of the two sections above mentioned, their purport is clearly the same, although the phraseology is different. But it is impossible to conclude from such a distinction, as contended for, that the city may, under the existing legislation, inquire into the legality of the sheriff's costs and fees when certified to as above stated.

City of New Orleans v. *I. W. Patton, Sheriff*, 168.

SHERIFF.

See Sales, No. 10—*Mary C. Gordon* v. *Patrick Gilfoil*, 265.
See Sales, No. 13—*Lehman, Newgass & Co.* v. *Dudossat*, 279.
See Sales, No. 14—*Guzman et als.* v. *Leblanc, Sheriff, et als.*, 280.
See Judgment, No. 7—*Alex. Lirette* v. *John Carrane*, 298.
See Sales, No. 20—*Morgan* v. *Johnson*, 539.

STREETS AND BANQUETTES.

1. Where the defendant, being sued for the payment of a certain sum in consequence of the construction of banquettes in front of his property in Locust street, averred that the city of New Orleans had not complied with the formalities set forth in the city charter, in this—that one-fourth of the owners of real property fronting on said unbanquetted street did not petition for the banquetting alleged to have been done in that locality;

Held—That a petition signed by a number of persons representing themselves as property holders on Locust street, asking for banquettes to be constructed in that street, being found in the record, it must be supposed, in the absence of rebutting evidence, on the principle of *omnia presumuntur rite esse acta* that the persons petitioning constitute one-fourth of the property owners on that street. *James J. O'Hara* v. *Henry Blood*, 57.

2. It is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made to petition the council for that purpose. It is sufficient if it be done by those on the portion sought to be improved.
Jomes Ready et als. v. *City of New Orleans et al*, 169.

SUCCESSION.

1. The land in controversy having been sold as the property of R. W. Graves, and his legal representative—the curator or administrator of his succession—having been cited to answer both the original and amended petitions claiming said land, and issue joined thereon as to him, the judgment for the land according to the corrected description was proper, but the judgment for the rent was erroneous. The curator was not the trespasser or actual possessor, and the minors could not be held liable for the act of trespass of their mother, now deceased, as well as their father. They could only accept with benefit of inventory, and take the succession of their mother after its debts were paid. But her succession was not before the court, nor was any one who could stand in judgment for such a claim against her.
Thomas H. Hunt v. *Mrs. A. V. Graves*, 195.

2. The assets shown as composing the separate succession of Mrs. Clark being her separate property, distinct from the assets of the succession of her husband, the opponent can not claim pay-

SUCCESSION—Continued.

ment out of these assets for his debt, which is a community debt due by the community estate.

Successions of George and Francis Clark—On opposition to the account of the executrix, 269.

3. Celestin LeBlanc, who gave a note in part payment of a plantation and slaves, due in February, 1862, to Jules LeBlanc, father of the minors in this instance, of whom said Celestin subsequently became the tutor, charges himself in his account with a large deduction on said note, on the ground that said note was given, in part, for the price of slaves. But slavery had not been abolished when this note fell due, and as it was in his hands when he was appointed tutor, it must be considered as so much cash belonging to the minors. Wherefore the deduction can not be allowed.

The tutor does not owe the interest claimed on the sums which came into his hands. They were not revenues, but merely a capital representing the total of the minors' inheritance, which was nearly absorbed by necessary expenses for the minors, by the payment of debts due by the successions of the minors' father and mother, and by the costs of administration. He can not be charged with interest on funds thus received.

Succession of Domitilde Hebert, 300.

4. The evidence showing that Linton resided in France, when and where he died, and that the only real estate he owned in Louisiana was situated in Rapides, his succession was properly opened in that parish.

Heirs who accept with the benefit of inventory, have no right to be put in possession of the property, until after the administration thereof is closed. *Succession of Stephen Duncan Linton*, 351.

5. The heir being considered seized of the succession from the moment of its being opened, the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession, and each of the heirs becomes an undivided proprietor of the effects of the succession for the part or portion coming to him, which forms among the heirs a community of property as long as it remains undivided, and the recording of a judgment against an heir must be held to affect all mortgageable property thus owned by such heir. *Smith & McKenna* v. *Charles*, 503.

6. Against a succession a writ of *fieri facias* can not issue, nor can a seizure thereunder be made by garnishment process.

Levy & Sugar v. *Cowan & Mayo and Mayo & Hodge. Collins Knox et al. garnishees*, 556.

SUCCESSION—Continued.

7. In this instance, if the accountant saw fit to file an amendment to her original account, it was but just that the opponents should have the right to oppose it, and for that purpose some delay was absolutely necessary. The judge *a quo* did not err in overruling the objection to the granting of the delay; nor was the objection to the permission to amend, if it be so regarded, better founded. No injury could result to any one, and it was the interest of all parties that an end be put to this litigation.

The fee allowed in the account, which was the object of the controversy, for defending the suit to reduce the legacy to the disposable portion, is not a proper charge against the estate. The testator having left *forced heirs*, the executrix might have learned from any member of the bar that the bequest of the usufruct of the *whole* of his property was reducible, and there was no necessity for defending such a suit, at least by the *executrix*. If the *legatee* chose to defend, it was to be at his own costs.

The opposition to the credit claimed for commissions due to the executrix should be maintained, as she is a legatee under the will.

Succession of David Hasley—Opposition of Heirs to Provisional and final account, 586.

Newman having died without forced heirs, giving by his will to his widow, the present Mrs. Hasley, the usufruct of his estate during her life, and the property itself to some of his heirs, and Hasley, after his marriage with widow Newman, having bought the rights and interests of all the heirs and legatees, these rights entered into the community then existing between Hasley and his wife, and at his death, one-half thereof belonged in full ownership to her, and the other half belonged to his heirs, subject to her usufruct, created by the will of Newman, her first husband. The *naked property* of this half interest in and to the property of Newman belongs to the heirs of Hasley, and she should be charged with its inventoried value.

As the community owned only the *naked property* to one-half of the estate, consequently the community owed Mrs. Newman, in addition to the price of her half of the property, the value, whatever that may be, of the usufruct of the property sold. No confusion ever took place as to the usufruct of Mrs. Newman, as *she* never purchased the naked property. The *community* and *she* were distinct and separate persons.

In the absence of other proof as to the value of the usufruct of such property, this court will consider the interest allowed by law for moneys due, as the value of such usufruct, and this the accountant is entitled to in addition to the half of the price of said sales.

Ibid, 586.

SUCCESSION—Continued.

Charges for the value of timber standing on the separate lands of the wife at the time of her marriage, and after that cut and sold, were properly allowed. The timber, before being cut, belonged to the wife, and its value received by the husband is a proper charge against the community.

The judgment of the court *a qua* giving the executrix five per cent. per annum interest on all the items allowed to her for paraphernal property disposed of by the husband, is wrong. Interest should be allowed only from the dissolution of the community, as the interests before that period entered into the community.

There being no debts due by the estate, that portion of the judgment of the court *a qua* which prolongs the administration of the executrix, to collect the notes and judgments due to the estate, is wrong. The administration should be closed, and the property should be turned over to those entitled to it as soon as possible. *Ibid*, 586.

8. In this instance the account and tableau of distribution, to which there are three oppositions, were homologated so far as not opposed. But this order or judgment was not signed, so far as this record shows.

This omission or neglect is attempted to be supplied by a memorandum in the following words written on the margin of the page on which the unsigned judgment of homologation is found: "The original of this judgment having been duly signed on the account, was lost or mislaid. J. G., Deputy Clerk." This certificate or memorandum is unauthorized by law, and can not supply the defect or omission. If the judgment was signed the fact should have been proved, like any other fact, by legal evidence.

Besides, it appears that the account was homologated without proof, except that the account had been advertised.

The administrator having appropriated the proceeds of the personal as well as real property of the succession to the payment of a judicial mortgage, to the exclusion of the ordinary creditors, the judge *a quo* correctly maintained the opposition of Claffin & Co. to this distribution, and directed that only the proceeds of the real property be applied to the payment of the judicial mortgage, and that the proceeds of the personal property be distributed among the creditors.

The court *a qua* did not err in rejecting the claim of Thomas Dugan for a privilege. Dugan had rented a store to the deceased, and the claim, to secure which he pretends to have a privilege, was for damages done to the building. If the law gives a privilege for such a claim (unliquidated damages) the claim was not recorded, and the personal property in the leased premises had been removed.

Succession of Michael R. Haggerty. Oppositions to Account of Administator, 667.

SUCCESSION—Continued.

9. Where the heirs of a succession have been recognized by a judgment of the Second District Court, parish of Orleans, and put in possession of the property, an action for debt due from said succession must he brought before the ordinary tribunals against the heirs themselves, if they be of age, or against their tutor.

Charlotte Pauline Emelie Romaine De La Ferriere v. *Succession of R. England*, 686.

See Obligations and Liabilities, No. 14—*Stevenson* v. *Lavinia Edwards et al.*, 302.

See Executor, No. 1—*Succession of James N. Brown*, 328; and No. 2—*Wells* v. *Annie Alexander and Husband*, 624.

See Evidence, No. 22—*Josephine H. Ames* v. *James Hale*, 349.

See Widow, No. 1—*Succession of John O'Loghlen*, 364.

See Jurisdiction, No. 13—*Succession of Joseph Ricard*, 365.

See Mortgage, No. 13—*Succession of Gayle*, 547.

See Sales, No. 22—*R. Green* v. *Baptist Church of Shreveport*, 563.

See Administrator, No. 9—*Succession of Everett Miller*, 574.

See Action, No. 11—*Lay et als.* v. *Succession of Elias O'Neal*, 643.

SURETY.

1. In this instance the main ground of the defense seems to be, that the judgment appealed from was against these defendants *in solido*, and it was so changed by this court as to discharge one of them, the Delta Newspaper Company, and hold the other two liable jointly and not *in solido*, and therefore the surety is not liable for the amount of the judgment so rendered. The Code of Practice provides that the appellant shall satisfy whatever judgment may be rendered against him, and that the surety shall be liable in his stead. The language used is plain and expressive—that the surety's liability is to be just that of his principal, to pay and satisfy the final judgment of the appellate court whatever that may be. The condition of the bond signed by the surety in this case is the one required by law. The defense he sets up is more specious than weighty. *Oulver, Simonds & Co.* v. *Leovy, Hart et al.*, 58.

2. This suit is brought against the sureties of a late sheriff to recover the amount of a judgment rendered against him. The main defense is the prescription of two years, pleaded under section 3546 of the Revised Statutes.

It is true that the defendants were not sued within two years from the day of the commission of the act complained of, but their principal, the sheriff, was, and this interrupted prescription as to them.

SURETY—Continued.

Judicial pursuit as to the principal interrupts prescription as to the surety, and suit against the surety interrupts it as to the principal.

Cohen & Wilson v. *William Golding and Francois Lacroix*, 77.

3. The judge *a quo* erred when he refused the surety the right to have the property of the principal discussed, he having pointed out the same and furnished the necessary money.

Jesse A. Mathews v. *Peter H. Kemp et al.*, 203.

4. Parol and written evidence in this case shows that defendant's obligation was that of surety, for when one "accedes to the existing obligation of another, and engages to see it performed, he becomes essentially a surety."

It is the essence rather than the form of a contract which must determine its character.

"Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not." Such seems to have been the obligation assumed by defendant. The renewal of the note without the consent of the surety, discharges him.

Charles E. Alter v. *James E. Zunts*, 317.

5. The objection that plaintiff can not proceed by rule to compel the surety on the appeal bond to pay the judgment in her favor, but must resort to a regular action, is answered adversely by the textual provision of section 37 of the Revised Statutes and the settled jurisprudence of the State.

The second objection that the court was without jurisdiction in this case, is also answered adversely to respondent, in precise terms, in section 3679 of the Revised Statutes.

It has been frequently held that where the creditor can not take out execution against the principal on the appeal bond, as in this case, he may proceed directly against the surety.

The only really important question in this suit is, does the surety on a suspensive bond in an appeal taken by an administrator or an executor from a judgment for a specific sum of money, become liable for the debt in case the judgment is affirmed? The answer is affirmative. The case at bar falls within the express provision of article 575 of the Code of Practice. The succession of Massieu was sued on a promissory note, and it was condemned to pay plaintiff ten thousand dollars, a specific sum.

Where a bond is given in reference to the law, stipulations unauthorized thereby will not invalidate it.

The assumption that the legal obligation of the succession on the note and judgment held by plaintiff is only commensurate with the ability of the succession to pay it, is a fallacy. The obligation

SURETY—Continued.

of the surety's principal—the succession of Massieu, a judicial person—is to pay the whole debt, regardless of its ability to do so. Therefore the respondent on the rule is liable on the appeal bond for the amount of plaintiff's judgment.

Mrs. E. LeBlanc v. *Succession of Charles Massieu—On rule against John Palsey, security on appeal bond*, 324.

6. The defense of the surety on an appeal bond furnished by the plaintiffs, on the ground that the necessary proceedings were not had against the principals, can not be sustained, two executions having been issued without effect, and the United States Circuit Court having specially enjoined the execution of any writ against the plaintiffs.

New Orleans, Mobile and Chattanooga Railroad Company v. *T. S. Dugan*, 465.

7. An injunction, which was subsequently dissolved, was obtained in the parish court of the parish of Morehouse, by Walker and Vaught, and an injunction bond for $500 given, with R. B. Todd as security. This suit is to make both principals and surety responsible in damages for the injunction wrongfully taken, without regard to the amount specified in the bond.

As to Walker and Vaught, the principals, the plea to the jurisdiction of the court was properly maintained. They must be sued at their domicile, which is New Orleans.

As to the security, who resides in the parish, the plea to the jurisdiction *ratione materiæ* is not tenable. It is the demand which must test the jurisdiction, and the demand in this case is over $7000, the plaintiff contending that the liability of the security is not limited to the bond.

The plea of *res judicata* is not tenable, because in the cases cited and in which it is alleged that the cause of action now presented had been pleaded, nothing was said in regard to damages, as that question was not properly at issue.

Kimbrough, Administrator, v. *Walker et als.*, 566.

8. The plea that the securities are not bound because their principal was not legally collector, and because much of the money collected as licenses and fines had not been legally assessed, can not be maintained.

These questions can not be raised in this collateral manner. It is a fact that the principal on the bond did act as collector, at least under color of authority, and that he did collect the licenses and fines imposed by those who were acting under color of authority. He must account for the moneys collected by him, even though unduly collected, and the sureties bound themselves to do so if he did not.

SURETY—Continued.

There is no merit in the defense that the sureties are bound only for such moneys as the principal collected during the first month o the term of his office, as he was required by law to make monthly settlements. It is evident that a violation of duty by the principal can be no excuse for the sureties, who are bound for the consequences of all violations of his duties.

The Mayor and Selectmen of the Town of Homer v. *T. S. Merritt et als*, 568.

9. The sureties on a suspensive appeal bond can be made liable where execution issued on certificate of the non-filing of the transcript by the appellant and the money could not be made after taking necessary steps against the principal.

Moore, Janney & Hyams v. *Louis Lalaurie*, 645.

10. Where the evidence showed that the existing liabilities of the surety on the appeal bond exceed his assets in this State, but where he testifies that he has in another State of the Union property worth a sum much larger than all his liabilities;

Held—That he is a good surety in this State. The law does not require the property of the surety, but only the person or residence of the surety to be within the State.

State ex rel. Liquidators of Salamander Insurance Company v. *Judge of the Fourth District Court, parish of Orleans*, 662.

11. The judge *a quo* dismissed the suspensive appeal granted, on the ground that the surety on the bond was not the owner of tangible property to the amount of the bond within the jurisdiction of the court. There seems, however, to be no question of the solvency of the surety. It is proved that the surety is worth the amount of the bond and that he resides within the jurisdiction of the court. This is all that the law requires.

State of Louisiana ex rel. G. A. Fosdick v. *The Judge of the Sixth District Court, parish of Orleans*, 685.

12. This is a suit, by rule, to compel a surety on an appeal bond to pay the remainder of the judgment, which had been affirmed on a suspensive appeal from an order of seizure and sale.

If the position taken be correct, that the proceedings against the surety was premature, as only the mortgaged property had been sold under the writ, and no execution had been issued against the judgment debtor and returned *nulla bona*, then to require bond for an appeal from an order of sale is an idle form.

Article 575 of the Code of Practice and section 37 of the Revised Statutes of 1871, justify the mode of proceeding in this case. The only execution which it was possible for the judgment creditor to cause to be issued, was issued and returned not satisfied. The

SURETY—Continued.

requirements of the law were substantially complied with. The surety knew that, under the executory process, no other property could be sold except that which was included in the mortgage, and when he stopped that by signing the appeal bond, he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.

By reason of the nature of the judgment, no execution could be taken out, after the return of the order of seizure and sale, which could reach the property of the debtor, and therefore plaintiff had the right to proceed immediately against the surety on the appeal bond. A different interpretation of the law would make of judicial suretyship a mere farce, the commencement rather than the end of litigation.

Georgiana Whan v. *Jesse R. Irwin, Tutor, et al.*, 706.

SEE BONDS No. 7—*Canal and Claiborne Streets Railroad Company* v. *Succession of Armstrong*, 433.

TAXES AND TAX COLLECTORS.

1. Although "due process of law" generally implies and includes regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding, yet this is not universally true. It does not apply to proceedings to collect the public revenue.

The revenue bill fixes the amounts of the license taxes due by retail merchants and retailers of spirituous liquors, and the act No. 47, of 1873, provides the manner in which taxes and licenses shall be collected from delinquent parties. This is sufficient. It is the mode provided by the legislator for enforcing a right of the sovereign and is *due process of law.*

The judge *a quo* did not err in refusing to receive testimony in regard to the election of Governor Kellogg and the validity of his official acts, on the ground that the right of an officer to a position which he holds can not be inquired into, or his action be declared null in a suit between third parties.

William L. McMillen v. *Robert K. Anderson*, 18.

2. Nathaniel Montross, of New York, took out an order of seizure and sale against certain property mortgaged to him by Samuel Jamison to secure the payment of promissory notes on which this suit was brought. The mortgaged property was sold and adjudicated to the plaintiffs. The amount due on the debt for which the property was seized, was paid, and the remainder of the proceeds of the sale was retained to pay prior encumbrances. The city of New Orleans claimed as due for unpaid taxes against the property a certain sum of money, with interest and costs and attorney's

TAXES AND TAX COLLECTORS—Continued.

fees, and alleged the city's right to be paid in preference to any other creditors. The State tax collector for the First District of New Orleans excepted to the jurisdiction of the court, showed that the State has a first privilege upon the property for all taxes and can not be called in as an ordinary creditor, as aimed at by plaintiffs.

But Smith & Co., who held certain mortgage notes, drawn by Jamison and secured also by first mortgage, took executory proceedings against the said property which plaintiffs have enjoined. They have made parties to this suit, as in a kind of *concursus*, the city of New Orleans, claiming a sum due for taxes, also the State tax collector of the First District of New Orleans and Nathaniel Montross, holder of the notes and mortgage under which the property was sold, and they have prayed that the proceeds of the sale of the property in their hands be distributed among the creditors of Jamison, according to their respective rights of mortgage and privilege.

The court *a qua* maintained the exception of the State tax collector, gave judgment in favor of the city for a certain amount of taxes with lien and privilege on the property, and dissolved plaintiffs' injunction.

The judge below erred only so far as he gave judgment in favor of the city for taxes. It would be in time after the execution of the order of seizure and sale now pending to present the claim for taxes, reserving to the city her right to be paid the taxes due out of the proceeds of the sale when made.

Hibernia National Bank et als. v. *Smith et als.*, 59.

3. This is a suit to force compliance with the terms of adjudication of property. The defense is want of title in the seller, the administrator of the Trainor estate. Trainor bought the lot about which the dispute is as to title at a tax sale made in August, 1860, at the suit of the city of New Orleans for city taxes. The sale was made under the provisions of the act No. 85 of the session of 1858, and act No. 175 of 1859, additional thereto. The provisions of these acts not having been complied with in the tax sale, it follows that the evidence does not establish a valid title in the succession of Trainor. *Successions of John and Mary Trainor*, 150.

4. The title to the act No. 7 of the extra session of 1870 is sufficiently expressive of its objects and purposes to indicate the intention of establishing a new city charter, and as a consequence the prescribing of the city limits or boundaries.

Cities may properly be extended in their boundaries as need or convenience may require. The extension of their boundaries may, as

in the present case, include rural districts, the condition of which is very materially different from the character of city property.

Taxation must be equal and uniform, but the ascertainment of the proper standard of valuation to form the basis of taxation is well nigh insurmountable. It is at least a difficulty that is never clearly and satisfactorily removed.

The principle is well settled and the doctrine established, that a Legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike.

The tax in dispute in this case has been imposed since the city charter of 1870 which makes it the duty of the City Council to lay an equal and uniform tax upon all real and personal property in said city.

From these well-settled principles and the law applicable to this case, it must be concluded that the objections urged against the constitutionality and legality of the tax in question are untenable.

City of New Orleans v. *Pierre Cazelar*, 156.

5. It has been decided by this court that the express grant of authority in article 118 of the constitution, to exempt from taxation property actually used for church, school, or charitable purposes, by implication prohibits the General Assembly from exempting property not actually used for such purposes.

The exemption from taxation of property used for certain purposes, expressly granted in the constitution, or in a law specially authorized by the constitution, means an exemption from all taxation, municipal as well as State. It means a complete and not a partial exemption, and this limitation must apply to the power of taxation previously delegated to the municipal corporations of the State.

Mr. and Mrs. Lefranc v. *City of New Orleans*, 188.

6. It is a rule of general jurisprudence, as well as a principle of public policy, to construe the redemption laws liberally. The object of the State is to collect the revenues, and not to deprive its citizens of any rights.

It is not to be deduced from the act No. 47 of the acts of 1873 that it takes away from creditors and all other parties interested, except the owner, the right of redemption which they had formerly enjoyed. If a mortgagee is a species of owner or quasi owner, as the doctrine is, he is embraced in the exception made by the express words of the statute.

To adopt a different conclusion it should clearly appear that the

TAXES AND TAX COLLECTORS—Continued.

State, which has declared that the property of the debtor is the common pledge of all his creditors, intends by the process of collecting the contributions of its citizens and inhabitants to defeat absolutely all the rights of creditors upon property subject to these contributions. The right of the State to its necessary revenue is paramount, but it is to be exercised with a strict regard to those other rights which the State itself has granted or guaranteed, especially of parties not delinquent, except it expressly declares otherwise for exigencies which make the declaration necessary. Therefore the right of redemption still exists in the owner or quasi owner under the prescribed conditions.

It being shown that the defendant has a residence both in New Orleans and West Virginia, spending a large portion of the year in that city, and attending to mercantile and other business, the tender to effect redemption by plaintiff was properly made at the residence of the defendant in New Orleans, as it does not appear that he had an agent to represent him in such matters.

The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. The law says a consignment may be made, but does not make it essential in case the creditor refuses.

The plaintiff should not, under the circumstances of the case, be concluded by her refusal to pay when the purchaser offered to accept. The latter had sold to a third party, who did not join in the proposal, and who might have refused to concur.

Charles E. Alter v. *Henry Shepherd et als*, 207.

7. Tax payers have a right to appeal from a judgment rendered against the parish, and in which a special tax is decreed.

A bare inspection of the record was sufficient to indicate an appeal as the course for the district attorney *pro tem.* to pursue, in view of his duty as an officer protecting the legal rights of his client, the parish of St. Charles. He took no appeal, however, and when the tax payers of said parish sought to exercise that right, not content with his own inaction, he joined the plaintiff in an effort to defeat the appeal, to the prejudice of his client, the parish of St. Charles. This is an extraordinary feature; the conduct of that public officer is reprehensible.

There is no proof in the record that the warrants or certificates offered in evidence were issued by the parish or were authorized to be issued by the police jury.

If the warrants or certificates were authorized to be issued, they are not sufficient to justify the judgment of the court below. Police juries, in the administration of the limited powers confided to

TAXES AND TAX COLLECTORS—Continued.

them, must provide means by taxation for the purpose and in the manner provided by law. They can not bind the parishes by putting in circulation their notes or warrants at pleasure.

O. J. Flagg v. *The Parish of St. Charles*, 319.

8. The position taken by the plaintiff that the tax collector has no right to sell forfeited lands, is not correct. It has already been decided that when the plaintiff repudiates his own title and sets up that of the State, he shows no cause to complain, and if the tax collector has no authority, as he alleges, to sell forfeited lands, there will be no divestiture of title, and no injury can result, at least to the plaintiff.

The tax collector charged with the duty of collecting all the taxes, the delinquent list included, has authority to sell forfeited lands, reserving to the former owner the right of redemption according to the statutory provisions on the subject. The decision given in the case of Hall *v.* Hall, 23 An. 135, has no bearing on the statutes under consideration, because they were enacted subsequent to the controversy in that case.

Frank S. Garner, Administrator, v. *R. K. Anderson, Tax Collector*, 338.

9. The tax collector is entitled to charge $2 for each deed of sale which he effects, but when one person buys all of a tract of land containing two thousand acres, and gets one deed, the tax collector is not allowed to charge for forty deeds under the supposition that the property has been subdivided into fifty-acre lots.

The State ex rel. P. S. Wiltz, Agent, etc, v. *Charles Clinton, Auditor*, 362.

10. The bank of Lafayette was organized since the adoption of the constitution of 1868. Article 118 of that instrument declares what property may be exempted from taxation. Any law which is in conflict with that article, whether passed before or after the adoption of the constitution is stricken with nullity thereby, unless the law created a contract with the other party, whose property is exempted before the adoption of the constitution.

City of New Orleans v. *Bank of Lafayette*, 376.

11. The State has the power to establish a police for the various municipal corporations which she has created and which she employs in the administration of government. As she could establish a police department in every parish of the State, no reason can be seen why she could not pass an act establishing a Metropolitan Police district composed of the municipal corporations (cities and parishes) mentioned in the act on the subject, and require the expenses thereof to be apportioned among them severally in pro-

TAXES AND TAX COLLECTORS—Continued.

portion to the number of policemen employed in each. This has been done in the acts of 1868 and 1869, establishing and regulating the Metropolitan Police district.

It is not pretended that plaintiff is required to pay a greater tax than any other citizen in the parish of St. Bernard, nor is there any proof showing that the apportionments assessed by the police commissioners for the years 1869 and 1870 are not just and in proportion to the number of officers and policemen assigned to police duty in said parish during said years. So that plaintiff, not being required to pay an unequal tax for the expenses of policemen actually employed for the public welfare in the parish of St. Bernard, has no cause to complain; none of his constitutional rights have been violated.

Hyppolyte Gally v. *Leopold Guichard, Tax Collector*, 396.

12. The question in this case is not about taxing the lots of ground which belong to the Poydras Female Orphan Asylum, but about taxing the buildings and improvements thereon, placed there under a contract which makes them the property of the lessee and therefore liable to taxation thereon. There is no doubt about the right of the city to collect taxes on said property from the defendant. *City of New Orleans* v. *S. P. Russ*, 413.

13. The State when selling a certain piece of property for taxes of 1871, due thereon, did not sell it freed from the taxes of 1872. The State had a concurrent mortgage and privilege to secure the taxes due for both years, and the sale did not purport to release the taxes of 1872. The former owner might have redeemed his land by complying with the requirements of the law after the sale, but he could not have taken the property back freed from the taxes of 1872. The purchaser bought the property subject to the taxes of that year.

Charles McAllister v. *R. K. Anderson, Tax Collector*, 425.

14. The property of the defendants is not exempted from taxation by their charter. There are no terms or expressions used in their acts of incorporation declaring a contract between the State and the corporators, and the existence of such a contract can not be inferred, nor has the property been used for the specific purposes expressed in the acts of incorporation, and which was the condition of an exemption from taxation.

City of New Orleans v. *The New Orleans Mechanics' Society*, 436.

15. In this instance the claim of the plaintiff against the defendant, tax collector, for uncollected taxes and licenses, is unfounded in law and equity. If the defendant is responsible to the plaintiff for the uncollected taxes, the defendant would have the right to

TAXES AND TAX COLLECTORS—Continued.

continue to collect them after his removal from office—which he can not do.

There is no evidence that the defendant received the warrants in payment of taxes, which he tendered in settlement, or that he was authorized to receive them. They were therefore properly refused by the treasurer in settlement of taxes collected.

The defendant was the agent of the parish, and he is bound to return to the parish the amount of taxes he received in currency, and the court will presume that he received currency, unless the law authorized the receipt of warrants in payment of taxes and the evidence showed that he actually received warrants in settlement of the taxes. Tax collectors can not be permitted to speculate in parish warrants.

Parish of West Baton Rouge v. *Robert Morris*, 459.

16. The tax bill on which this suit is brought is made out against the City Hotel, R. S. Morse and James E. Zunts. The judgment was that the City Hotel, etc., is hereby condemned to pay, etc. This proceeding was had in the case entitled the city of New Orleans v. City Hotel, R. S. Morse and James E. Zunts, who have appealed on the ground that they know of no law which justifies a judgment against property the owners of which are not unknown.

There can be no doubt, under the circumstances, that the appellants were the parties who were condemned in the judgment, which must be construed with reference to the pleadings in the case and the obligation sought to be enforced. This is necessarily implied in their application for an appeal.

It is just as much the duty of the plaintiff as of the defendants to see that the clerk of the court, or the judge, makes no error in entering the judgment.

City of New Orleans v. *City Hotel, R. S. Morse and James E. Zunts*, 470.

17. Because the defendant is required to pay a license, it is no reason why property owned by it should not be taxed like other property of the city of New Orleans.

City of New Orleans v. *The People's Insurance Company*, 519.

18. The only question in this case is, whether municipal taxes for 1873 on the capital stock of the People's Bank can be imposed. It must be answered in the affirmative. In 1869, when the defendant, the People's Bank, was incorporated under the act of the fifteenth of March, 1855, entitled an act to establish a general system of free banking in this State, the statute of 1857 exempting free banks from municipal taxation had been stricken with nullity by article 118 of the constitution of 1868. Such exemption formed, therefore, no part of the contract arising from the act of incorporation.

TAXES AND TAX COLLECTORS—Continued.

Defendants contend erroneously that there is no statute authorizing the municipal taxation of a banking institution, and that the ordinance passed by the city without the sanction of such law is absolutely void.

The capital of a bank is its property and is liable to taxation unless specially exempt.

By section 12 of the charter of 1870 the city of New Orleans is authorized and required to "*levy an equal and uniform tax*, for the purposes of this act, *on all property, real and personal*, in said city." * * *

The City of New Orleans v. *People's Bank*, 646.

19. The defendant bank having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the State under previous laws on the exemption from taxation, and there is no conflict with the constitution in levying the present tax.

City of New Orleans v. *Metropolitan Loan, Savings and Pledge Bank*, 648.

20. The city of New Orleans, by a special act No. 73, April 26, 1872, is declared not to be restrained in requiring a license from the Insurance Companies within her boundaries, by either the act No. 42, March 3, 1871, or act No. 14, March 8, 1872, which provided for the general revenue of the State, and on which defendant relies in the suit instituted against it by the city of New Orleans for the recovery of a license tax.

City of New Orleans v. *Globe Mutual Life Insurance Company*, 656.

21. This is a suit to annul a tax sale by a justice of the peace and recover the property thus disposed of. All property seized under writs of justices of the peace, whether the same be movable or immovable, must be appraised and sold in the same manner as property seized and sold by sheriffs. None of the formalities required and made necessary by law to constitute a seizure by the sheriff or other officer of the parishes of Orleans and Jefferson having been complied with in this case, it follows that nullity of the sale is the consequence.

As defendants in their answer set up no reconventional demand for taxes paid by them since their pretended purchase of the land herein decreed to belong to plaintiff, no relief can be given in that regard.

Thomas McNeil v. *Peter J. Kramer et als. City of New Orleans in Warranty*, 678.

22. A suit for taxes is summary and is not to be tried by a jury.

City of New Orleans v. *Hugh Cassidy*, 704.

23. There is nothing in the act creating the Superior District Court, which confines to that court the proceeding of relator, asking for an order to the sheriff to put relator in possession of certain real

TAXES AND TAX COLLECTORS—Continued.

estate which he alleges to have purchased at a tax sale of the same by the tax collector under the provisions of act No. 47 of 1873, entitled an act to enforce the payment of taxes due the State, etc.

The Fourth District Court for the parish of Orleans is a district court in contemplation of the act No 47, invoked by relator, being a district court of general civil jurisdiction.

The act does not declare in express terms that the order to the sheriff to put a purchaser in possession shall issue without notice, and this court may well construe it as adopted with reference to the general laws relating to summary proceedings in the courts of this State. Hence no constitutional question arises.

The judge *a quo*, in this instance, did not err in refusing to issue the order as prayed for, because no party was made to the proceeding upon whom notice could be served. Consequently there is no proper showing for the writ of mandamus to issue from this court.

State of Louisiana ex rel. George C. Norcross v. *Judge of the Fourth District Court, Parish of Orleans*, 704.

24. This court can not perceive how a taxpayer can justly complain that the levying of a tax is unequal, because some property in the State has been omitted in the assessment, either through inadvertence or because it is supposed to be exempted by an unconstitutional law; for the effect would be the same.

Probably there never has been an assessment which embraced *all* the property of the State, but that fact did not render the assessment unconstitutional. When the omission is discovered, the property must be assessed, for the constitution and laws require that all property shall be assessed.

Certain questions discussed in this controversy can not be considered by this court, as they do not relate to the legality or unconstitutionality of the law, but relate to questions of fact, such as whether the Auditor made accurate calculations for the purpose of the assessment for taxes, or exceeded his authority, as the amount in dispute is less than five hundred dollars; wherefore this court has not jurisdiction for that purpose.

The defendant can not raise the question concerning the legality of the warrants to pay which the one-mill tax is said to be levied, as the holders of said warrants are not parties to this suit; and the amount of revenues to be raised is a matter within the legislative discretion. *State* v. *Maxwell*, 722.

SEE MANDAMUS, No. 4—*State ex rel. Macaulay* v. *Charles Clinton, Auditor*, 429.

METROPOLITAN POLICE WARRANTS, No. 1—*Louisiana National Bank* v. *City of New Orleans et als.*, 446, *and No. 2—State ex rel. Lubie* v. *Administrator of Finance, City of New Orleans*, 493.

TELEGRAPH COMPANY.

1. This is a suit to recover the amount of losses sustained in consequence of incorrect information given by defendants, in violation of their contract with plaintiffs, as to the fluctuations of the gold market in New York. The defense is, that the error in the telegram was no fault of defendants, but occurred in the working of the indicator of the Gold Stock Company placed for convenience in the office of defendants in New York, but under the management of a corporation entirely distinct from theirs. This does not exonerate them from liability, because by their contract they were bound to carry to plaintiffs correct information, which they could have obtained without relying on the indicator.

Bank of New Orleans v. *Western Union Telegraph Co.*, 49.

TENDER AND CONSIGNMENT.

1. The object of consignment is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. The law says a consignment may be made, but does not make it essential in case the creditor refuses.

The plaintiff should not, under the circumstances of the case, be concluded by her refusal to pay when the purchaser offered to accept. The latter had sold to a third party, who did not join in the proposal, and who might have refused to concur.

Alter v. *Shepherd et als.*, 207.

TUTORSHIP.

1. The property of a cotutor is not subjected to the legal mortgage of the minor. But, by the term cotutor, must be understood the person who becomes so by the fulfillment of the requirements of law.

Where the mother, being the natural tutrix of her minor children, contracts a second marriage, she is required, previous to the marriage, to cause a family meeting to be convened for the purpose of determining whether she shall remain tutrix after the marriage. If she fails in this duty she loses the tutorship *ipso facto*. In such a case, the children of a previous marriage have a legal mortgage on the property of the new husband for the acts of the tutorship thus unlawfully kept by the mother, reckoning from the day on which the new marriage took place.

W. Bodein Keene v. *George Guier and Sheriff*, 232.

2. Because a cotutor is liable to account for property belonging to minors which may have come into his hands, it does not follow that he can not be appointed their tutor by testament.

The declaration of three of the five members of a family meeting

TUTORSHIP—Continued.

called in the interest of the minors, that that the appointed tutor is not a fit person to have charge of the minors, can not be taken into consideration. In the first place, there was nothing to authorize the family meeting, there being no vacancy in the office of tutor to be filled. In the second place, the reasons they give for their opposition are entirely outside of the law. This court can not say in advance that the mother's choice of the person who, in her opinion, was best fitted to have charge of the minors, was ill-advised. *Succession of Mrs. S. B. Fuqua*, 271.

3. Celestin LeBlanc, who gave a note in part payment of a plantation and slaves, due in February, 1862, to Jules LeBlanc, father of the minors in this instance, of whom said Celestin subsequently became the tutor, charges himself in his account with a large deduction on said note, on the ground that said note was given, in part, for the price of slaves. But slavery had not been abolished when this note fell due, and as it was in his hands when he was appointed tutor, it must be considered as so much cash belonging to the minors. Wherefore the deduction can not be allowed.

The tutor does not owe the interest claimed on the sums which came into his hands. They were not revenues, but merely a capital representing the total of the minors' inheritance, which was nearly absorbed by necessary expenses for the minors, by the payment of debts due by the successions of the minors' father and mother, and by the costs of administration. He can not be charged with interest on funds thus received.

Succession of Domitilde Hebert, 300.

4. It was improper for a tutor to use a mortgage note issued for a specific purpose on the minor's behalf as collateral security of an individual debt of his own unconnected with said minor's interest. The plaintiff was aware of these circumstances and therefore can not recover. *Temple S. Coons* v. *Joseph F. Kendall*, 443.

VICKSBURG, SHREVEPORT AND TEXAS R. R. CO.

1. This court is satisfied that the document sued on is the property of plaintiffs and not of the intervenors, by whom it was transferred, and not merely pledged to plaintiffs, as he alleges, to guarantee the payment of the indebtedness of a third party.

The position taken by the intervenor that the obligation sued on was not stamped when it was delivered to plaintiffs, and that it is therefore a *nudum pactum*, is entirely untenable. If he gave them the obligation without being stamped, when stamps should by law have been placed upon it, it was a wrong doing of his own from which he can draw no protection. Besides, the plaintiffs had the

VICKSBURG, SHREVEPORT AND TEXAS R. R. CO.—Continued.
right to cause the required stamps to be put upon it. The requirements of the law are complied with, if the stamps are on the obligation when sought to be enforced.

Allegations that intervenor, when he parted with the obligation, which was negotiable, and of which he claims the ownership, did so despite the agreement he was under with his associates to keep it out of commerce, can do him no good, and he can not be listened to on this point.

It is conceded that the defendants, with others, at sheriff's sale, purchased all the rights, privileges, franchises and other property belonging to the Vicksburg, Shreveport and Texas Railroad Company. This company was a corporation established by law. As a corporation thus established, its members were not personally responsible for the debts of the company beyond the amount of stock which they individually held.

As to the defendants, they did not acquire by their purchase the immunity of the stockholders of that company from liability beyond the amount of their stock. This purchase conveyed to them all the rights, privileges, franchises and other property of said company; but it did not and could not make them a corporation, for corporations are created only by special act of the Legislature, or in the manner provided for by law. As regards the rights, privileges, franchises and other property of the company aforesaid, the purchase made defendants joint owners thereof and nothing else. It did not make them that company.

If, as alleged, the ratification of the sale by the State constituted them a corporation, their corporate rights would take effect only from the passage of the act. But the act was passed subsequently to the publishing of the instrument sued upon. The rights of the holders of the obligation had vested, and the Legislature could not shake them.

Defendants' plea that the obligation sued on purports to have been issued by the Vicksburg, Shreveport and Texas Railroad Company, and therefore that they, the defendants, can not be liable individually, does not protect them. Obligors are bound not by the style which they give to themselves, but by the consequences which they incur by reason of their acts.

It was sufficient that the instrument sued upon was stamped when offered in evidence.

This court can neither add to the law nor take from it, and as the law limits the solidarity of obligors engaged in carrying personal property for hire, to that property which is carried on ships, or other vessels, it can not be extended to those who carry it on a railroad. Hence the defendants are liable jointly, and not *in solido*.

VICKSBURG, SHREVEPORT AND TEXAS R. R. CO.—Continued.

It appears that others besides the present defendants are the owners of this road. Their names were given to the plaintiffs by the defendants. They should have been made parties to the suit. The owners are nine in number. Judgment is therefore rendered in favor of the plaintiffs and against the defendants for the proportion due by each.

John Chaffe & Brother v. *John T. Ludeling et als. W. J. Q. Baker, Intervenor*, 607.

WALL IN COMMON.

1. This is a contract about a wall claimed to be in common. Buckner bought only what his vendors could sell. Not having paid one-half the cost of erecting the wall, they did not own half of it, and could not sell the half thereof. Buckner's ignorance of the want of title to one-half of the wall in his vendors should not prejudice the plaintiffs, if it operate a hardship to him. His becoming owner of all the premises owned by his vendors conferred no immunity upon him to use the wall as a wall in common, free of charge. He acquired by his purchase only the right which his vendors had to make the wall one in common, by paying half the cost of erection. Availing himself, as it seems he has done, of the benefit of the wall, it is but fair he should pay for one-half the expense incurred in building it.

Chism & Boyd v. *P. J. Lefebre*, 199.

WIDOW.

1. Under article 3252 R. C. C., which says: "The widow or legal representatives of the children shall be entitled to demand and receive from the successor of the deceased husband or father a sum which, added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars," the proof should have shown that, in this instance, the widow also had no means, or, if she had any less than one thousand dollars, what it was. Her demand should be rejected on that ground; nor can the demand be made by the attorney for the absent heirs. The legal representatives of the children would be their tutors. *Succession of John O'Loghlen*, 364.
2. The privilege conferred on the widow in necessitous circumstances is superior to all other privileges, except those of the vendor, and those to secure the payment of expenses incurred in selling the property.

Succession of George W. Rawls. Opposition to Tableau of Debts, 560.

3. The plea to the jurisdiction is without weight. The demand of the opponent under article 2382 of the Revised Code for a marital

WIDOW—Continued.

portion is not the action of a creditor against a succession. It is the portion which the law allows in the settlement of a succession to the surviving spouse in necessitous circumstances where the deceased died rich. It is a right which must be asserted in the court charged with the settlement of the succession.

Succession of Callie N. Newman. Opposition of G. W. Newman, 593.

See Wills and Testaments, No. 1—*Succession of Hampton Elliot*, 42.

WILLS AND TESTAMENTS.

1. The property in controversy and claimed by Davis, belonging to the succession of Elliot, whose domicile was in Adams county, State of Mississippi, and it being undoubtedly the purpose of Elliot, in making the assignment under which Davis claims, to conceal his property from his wife, whom he had abandoned, the court *a qua* did not err in rejecting his demand.

The title set up by Mrs. Risley, the second claimant, can not be considered a valid will. It is written in pencil on a small piece of paper; the intention of the party to make a will is not manifest, and there is no *corpus* on which a will can operate. The notes referred to in the writing are not those involved in this suit. Therefore the court below did not err in declaring the writing void as a will and setting aside the probate thereof.

The will relied on by Mrs. Burke, a third claimant, is valid, and under it she is entitled to the property of Hampton Elliot as far as he was able to make a testamentary disposition thereof according to the laws of Mississippi, the place of his domicile, and where the will under consideration was made. It is not sufficiently proved that the parties lived in open concubinage and were therefore not capable of making donations to each other, except to the limited extent allowed by article 1481 of the Revised Code of 1870.

The rights of Mrs. Elliot, the surviving widow and fourth claimant, must be determined by the laws of Mississippi. According to those laws, said widow is entitled to one-half of the personal property of the deceased.

The immovable property is controlled by the laws of this State and passed under the will to Mrs. Burke.

Succession of Hampton Elliot, 42.

2. The motion to dismiss this appeal on the ground that the appeal bond was not executed in favor of the clerk can not prevail. The bond was executed in favor of John S. Lanier, whom the record shows to be clerk.

WILLS AND TESTAMENTS—Continued.

The peremptory exception to the jurisdiction of a special judge to issue an order granting letters of executorship *ratione materiæ* was properly overruled. Under the facts of this case the parish judge proceeded lawfully in selecting a lawyer having the proper qualifications to preside over the trial in his place.

The instrument admitted to probate must be received as a will. It is in the olographic form, entirely written, dated, and signed by the testatrix. It is not essential that the date to an olographic will should precede the signature; it may be placed below.

There is no *fidei commissum* in the will. The testatrix does not attempt to put any property in the name of any person except her children. All she does is to direct how that property shall be administered until her children shall marry.

The intention of the testatrix expressed in her will is that her husband should have the entire control of her children; that they should make their homes with him, and that he should control their property until they married. Her wishes could not be carried out unless he was their tutor; hence it was, in intendment of law, his appointment as tutor. That she had the right to appoint him can not be doubted.

Because a cotutor is liable to account for property belonging to minors which may have come into his hands, it does not follow that he can not be appointed their tutor by testament.

The declaration of three of the five members of a family meeting called in the interest of the minors, that the appointed tutor is not a fit person to have charge of the minors, can not be taken into consideration. In the first place, there was nothing to authorize the family meeting, there being no vacancy in the office of tutor to be filled. In the second place, the reasons they give for their opposition are entirely outside of the law. This court can not say in advance that the mother's choice of the person who, in her opinion, was best fitted to have charge of the minors was ill-advised.

Succession of Mrs. S. B. Fuqua. 271.